

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

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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.

DOI is one of the oldest law-enforcement agencies in the country and New York City's corruption watchdog. Investigations may involve any agency, officer, elected official or employee of the City, as well as those who do business with or receive benefits from the City. DOI's strategy attacks corruption comprehensively through systemic investigations that lead to high-impact arrests, preventive internal controls and operational reforms that improve the way the City runs.



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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 h	erewith my investigative report and recommendations for	r remedial action
concerning the whi	istleblower claims that were filed by	
and	pursuant to Section 12-113 of the New York City Admin	nistrative 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

Enclosures

REPORT OF ACTING DEPUTY COMMISSIONER OF INVESTIGATION CONCERNING WHISTLEBLOWER ALLEGATIONS

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October 10, 2018

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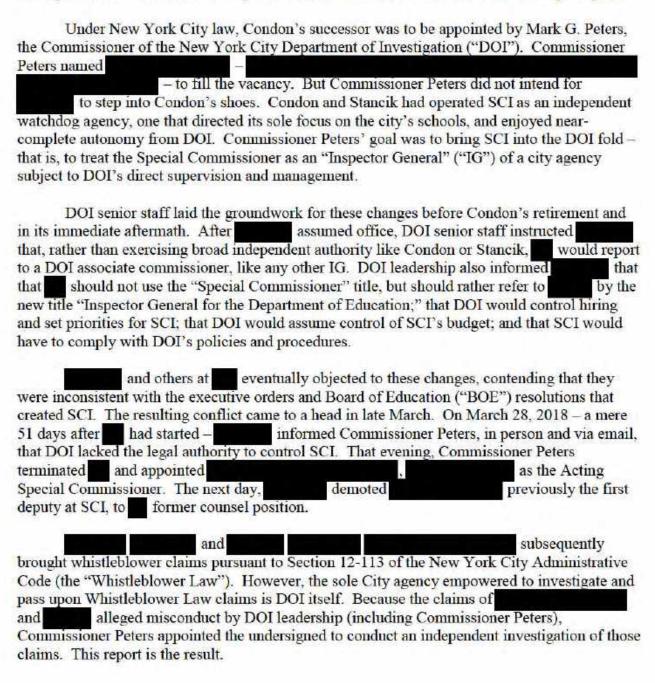
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I. INTRODUCTION AND EXECUTIVE SUMMARY

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.



B. Executive Summary

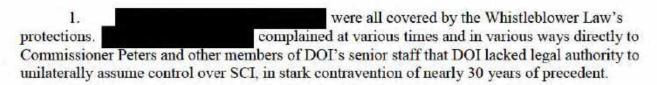
After a comprehensive examination of the facts and the governing law, we sustain the whistleblower claims of and reject claim.

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.

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:



 The Whistleblower Law protects complaints that the speaker "knows or reasonably believes to involve" an abuse of authority. The reports by least "involved" a claim that Commissioner Peters had abused his authority – one of the species of claims of wrongdoing encompassed by the Whistleblower Law.

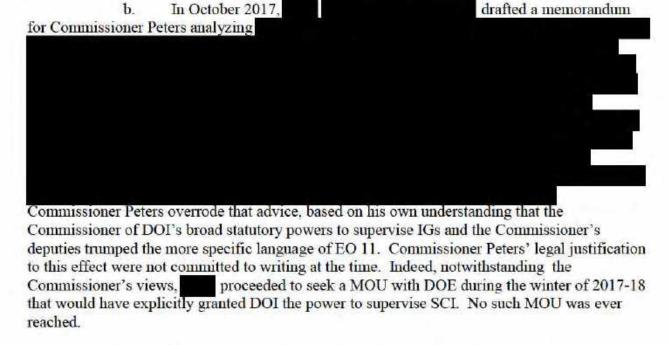
DOI senior staff suggested that the phrase "abuse of authority" as used in the Whistleblower Law has a narrow meaning – namely, that it contemplates a level of wrongdoing that exceeds a mere technical violation of law. In support of this view, Commissioner Peters and others testified that he had a good-faith 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

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.

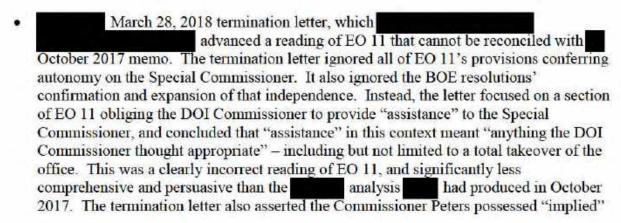
- 3. Indeed, the takeover of SCI did amount to an "abuse of authority," because under the plain text and long-established understanding of the governing law, the Special Commissioner possesses broad investigative autonomy and control over his or her office a level of independence that far exceeds that 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.



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:



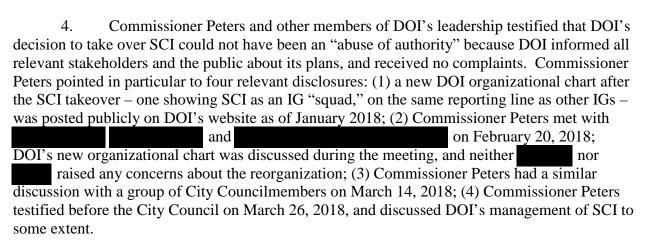
supervisory powers over and the Special Commissioner's office that far exceeded the express reporting relationship specified in EO 11 – this, too, was a specious position.

- 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.
- 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:

- O 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.



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 — 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 touching upon the scope of DOI's authority to control
SCI, Commissioner Peters drafted an email to
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
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 and it was the new structure that was causing a conflict with
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.
 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,
of March 28 – the date of firing, and of their final whistleblowing complaint.
of watch 28 – the date of their final whistleolowing complaint.
Several factors show that belief to be reasonable. For the reasons already discussed,
were justified in believing that DOI's actions violated the governing law
were justified in othering that Dor's actions violated the governing law
But there was more. In addition to the
law itself:
• — told and
in a pair of March 2018 meetings that agreed that DOI's actions were inconsistent
with the governing law.

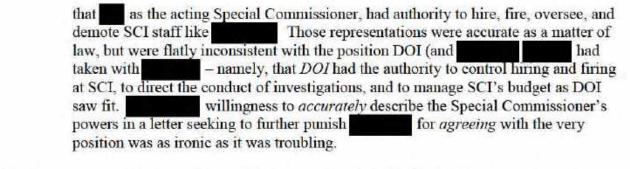
- Commissioner Peters and his senior staff had offered statements and other indicia indicating a lack of concern for following the law. Most troublingly, in a February 27 meeting with Commissioner Peters told "I could, if I had to, go to City Hall and have them just wipe out that executive order. I probably 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.
- 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. 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 to think otherwise.
- third day on the job DOI informed On February 7, 2018 – intended to use a SCI budget line (and DOE funds) for a general-purpose administrative role at DOI. would have reasonably thought that use of DOE funds for a role other than DOE oversight to be illegal. immediately raised concerns about the legality of the request, after which 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 attempted to confer with about the status of that legal justification. was written up on disciplinary charges charges that were entirely unjustified. would have had been retaliated against for raising a valid legal reasonably believed that 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 belief that DOI had abused its authority was reasonable.

 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*.

	occurred in the absence of the retaliatory motive," but this "does not require proof that i was the only cause of the employer's action." <i>Id.</i>
after maki demotion active disc few montl	cussion about the scope of DOI's power, and with all relevant events occurring within
contradict but becaus were insul Peters' rea	oreover, there are numerous "weaknesses, implausibilities, inconsistencies, or ions in the employer's proffered reasons for its action." <i>Id.</i> DOI's story is that were fired not because they had accused DOI of exceeding its authority, se they refused to follow orders from DOI leadership – in other words, because they bordinate. On this logic, could have criticized Commissioner ading of the law to their hearts' content so long as they continued to follow DOI o's directions in the meantime. The "insubordination" theory suffers from two key less.
•	It is inconsistent with the record. Neither insubordinate, in the sense of explicitly refusing to follow DOI's (illegal) directions. Commissioner Peters may have been told that had refused to follow directions, but Commissioner Peters had two in-person discussions and one written exchange with on March 28 (the day of firing), and the subject of insubordination never arose. In contrast, interpretation of EO 11 and Commissioner Peters' contrary understanding of the law were discussed. Crucially, termination letter said nothing about any supposed insubordination; rather the letter conveyed DOI's disagreement with views about EO 11. The inescapable inference is that was fired for the latter, and not the former. (The termination letter also alluded to "performance" issues from which allegedly suffered, but Commissioner Peters testified that any such issues were not the actual cause of termination.)

•	case is even more straightforward. (with Commissioner Peters' agreement) retaliated against because adopted the views expressed in a March 28 email to Commissioner Peters flagging DOI's lack of authority to take over SCI. That email expressly identified as whistleblowers protected by the Whistleblower Law; notably, the email said nothing about any refusal to follow DOI's directions. (and testified) that interpreted the email as a refusal to follow Commissioner Peters' direction; but that interpretation was atextual and unreasonable.
	Even if would not be enough to justify adverse employment action on these facts. The core complaint proffered by 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 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 position who refuse to follow an illegal order.
•	For another factor demonstrates retaliatory intent — namely, the fact that, during the pendency of this investigation, and others at DOI took a series of counterproductive steps to ensure that salary was reduced. By way of background: when demoted counsel — a move that entailed a roughly 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 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
	The tactics DOI used to ensure troubling. After termination, Commissioner Peters had named the acting Special Commissioner. On May 3, 2018, sent the City's Department of Citywide Administrative Services ("DCAS") a letter seeking to effectuate the salary reduction. letter asserted that 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." had never "expressed" any such thing; had premised the demotion solely on legal views, a point that made to during the meeting in which advented.



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



8. For these and the reasons that follow, we conclude that 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

the time of terminated on March 28, 2018; was demoted the next day. At the time of termination and 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

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 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).

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

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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. 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.

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.

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

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

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testified that understood DOE was not a City agency "based not only on . . . a year-and-a-half of experience here, but in my prior role 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, 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." 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. 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

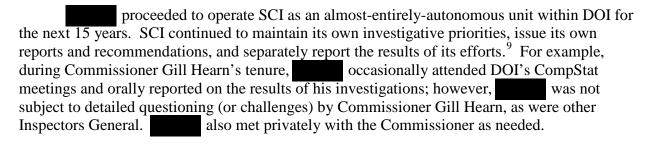
Commissioner Stancik suddenly grew ill in early 2002, and passed away in March of that year. On June 18, 2002, Mayor Bloomberg and DOI Commissioner Rose Gill Hearn jointly announced that Stancik would be succeeded by Richard Condon. Condon was a well-known figure, particularly in New York City law enforcement 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. <u>Appointment of Special Commissioner</u>. 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.

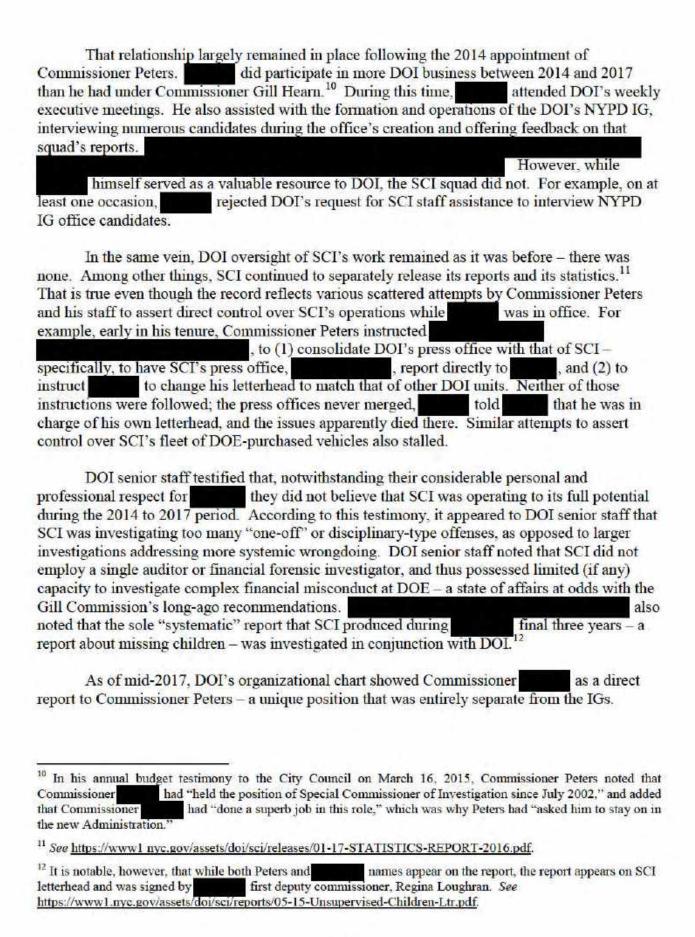
5. 15-Year Tenure as Special Commissioner



At the same time, the record makes clear that Commissioners Gill Hearn and Peters considered to be a part of DOI in some sense; for example, DOI's 2002-03 annual report lists Commissioner 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 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 SCI, and DOI.

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a. Background to Dispute – Late 2017 And Early 2018

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

In mid-to-late summer of 2017, after 15-plus years at SCI, moved forward with plans to retire. 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. News of imminent retirement prompted discussions among DOI leadership about the future of SCI. These discussions revolved around two potential options for a post—world. One option was to recruit a new Special Commissioner of comparable stature to —a figure with substantial law enforcement experience and status who would essentially step directly into 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

Loughran's sudden departure presented challenges, both for personal and professional reasons. As 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 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 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 stature had proven beneficial in the past. 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.

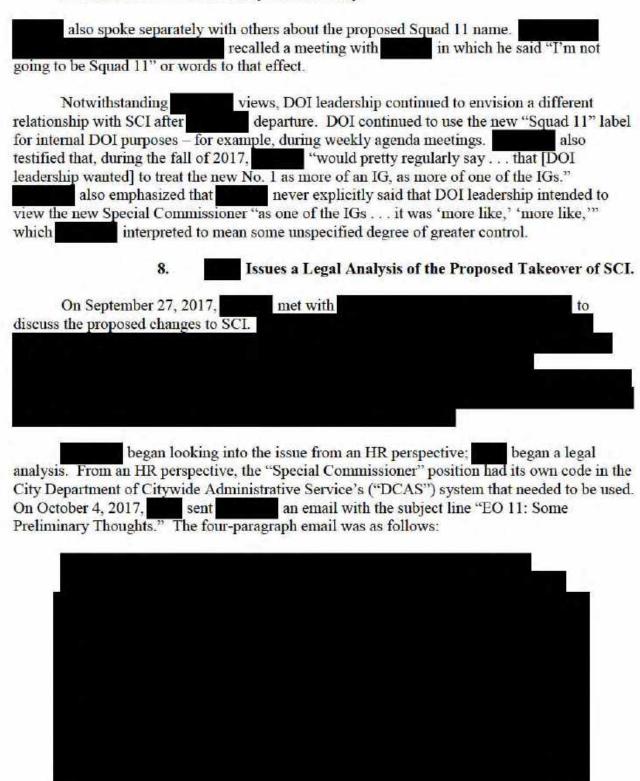
Around September 2017 (*i.e.*, before had retired), DOI leadership began to refer to the SCI office by an entirely new designation — "Squad 11." The "squad" label referred to DOI's existing organizational structure, under which IG offices (or groups of IG offices) were organized by numbered squads, each of which reported (through an associate commissioner) up to DOI senior leadership. SCI had never before been referred to as a "squad," and did not accept the title. Less 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, 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:

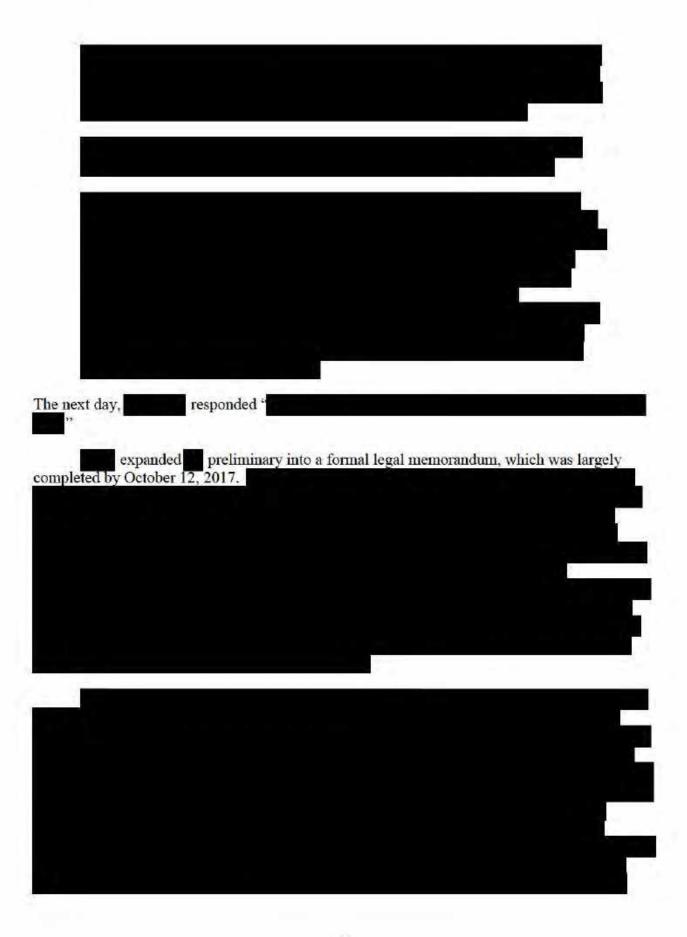
For administrative purposes, the Department of Investigation has begun to refer to the Office of the Special Commissioner of Investigation for the New York City

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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.

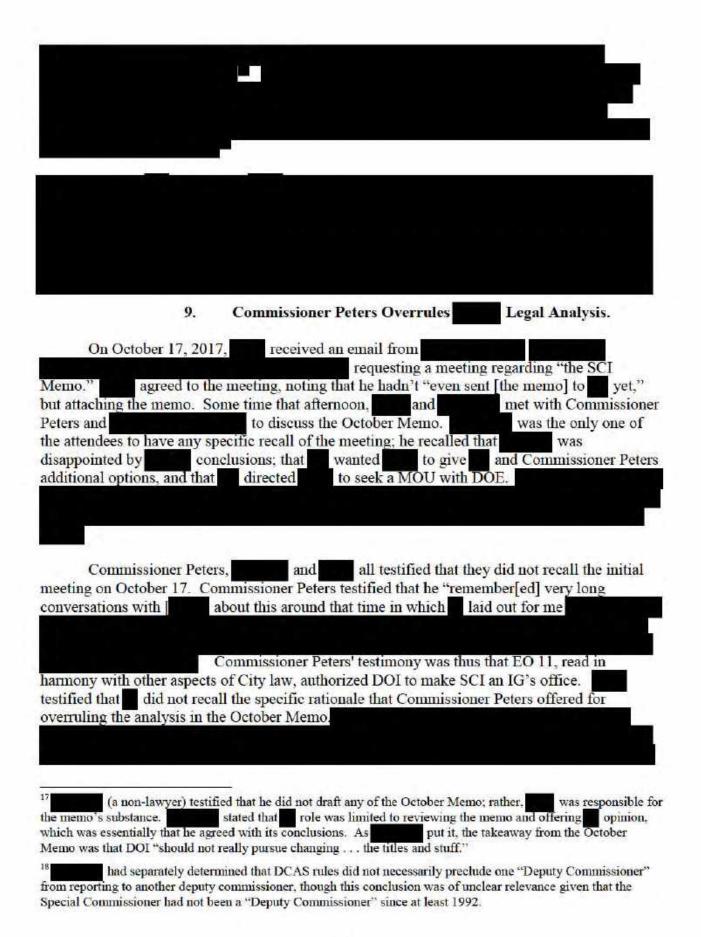
School District as Squad 11.... The Office of the Special Commissioner will continue to use the terms "SCI" and "Office of the Special Commissioner" in all communications both internally and externally.







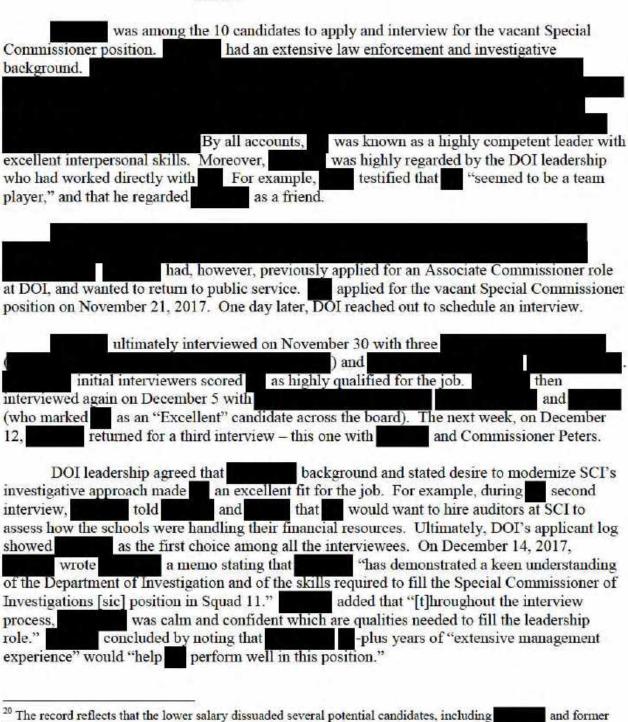
eventually concluded that, as a result of the Special Commissioner line having moved to DOI, there would be no impediment to the DOI Commissioner reducing the Special Commissioner's salary so long as it was within the band provided for by the title code.



testimony was somewhat different; testified that over "multiple conversations," 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 set forth above, testimony was that directed to pursue the MOU at the initial October 17 meeting. The testimony was that the could not recall telling to pursue at the 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."
10. DOI Proceeds With the Plan to Transform the Special Commissioner Role to an Inspector General Position.
While 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, had instructed 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

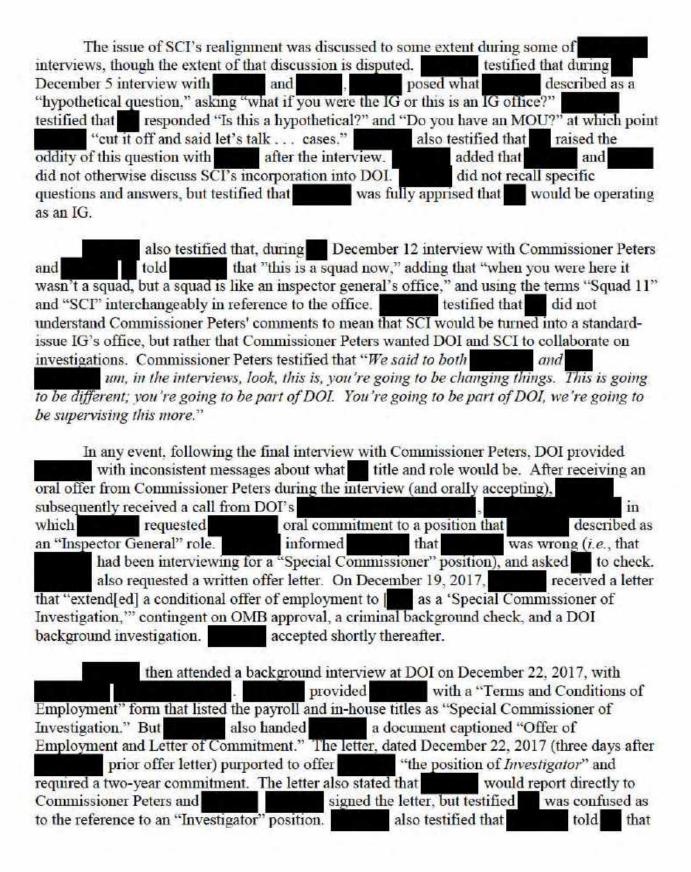
third paragraph provided that the Special Commissioner would "provide overall direction to DOI's SCI Inspector General Office." Notwithstanding this inconsistent verbiage, DOI staff testified that it was well-known at DOI that the new position would perform an IG role, and that the associated salary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

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



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, from pursuing the position.

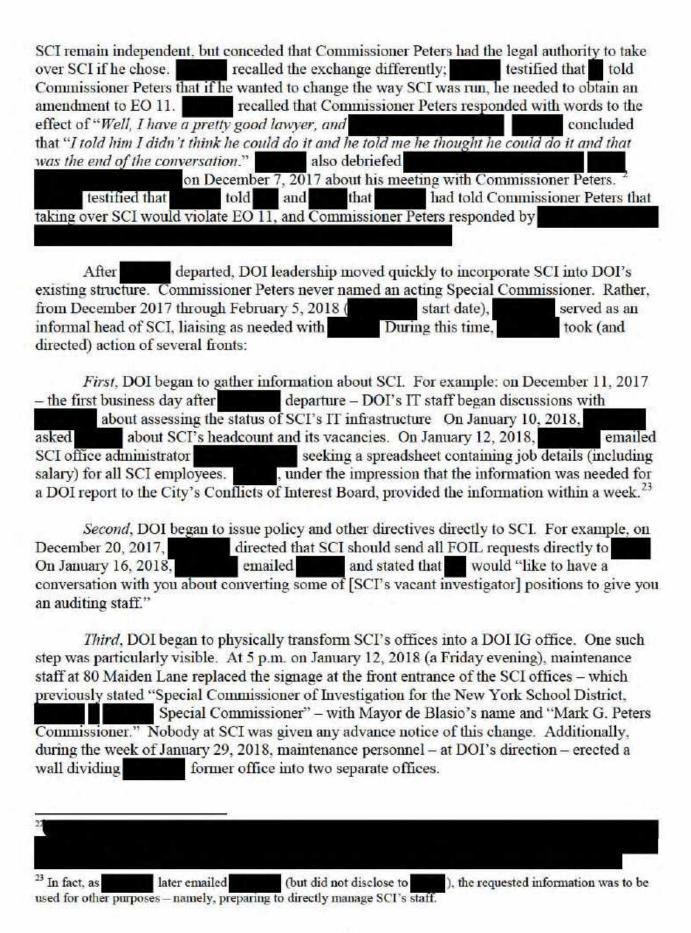


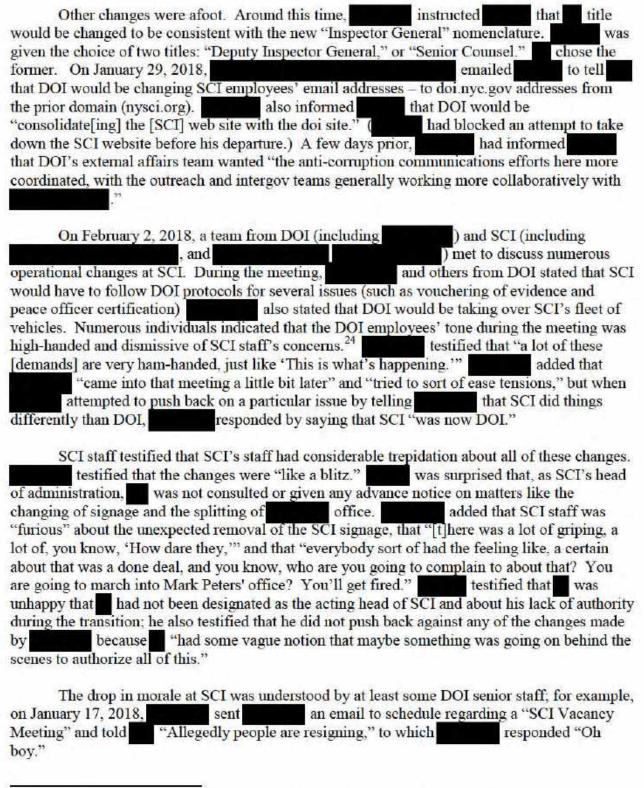
he had never delivered such a letter to an executive-level hire; rather, two-year commitments were generally required only for lower-level investigators.²¹

Interviews and Is Promoted to First Deputy. 12. Parallel to the hiring of DOI also interviewed for and ultimately chose first deputy -The record reflects that was capable and respected; on two occasions in 2014 and 2015, (with whom had a prior social relationship) solicited to join DOI as an IG, which never proceeded. requested a meeting with On October 26, 2017, during which that he would be a good fit for a SCI leadership role. suggested to he was interested, and agreed to discuss the issue further. During a subsequent meeting on provided November 16, 2017, with a more specific proposal – DOI wanted to serve as the office's first deputy. again expressed interest. That afternoon, received a call from and , the purpose that, because DOI had not yet posted the First Deputy position, of which was to inform should apply for the then-vacant Special Commissioner role. then interviewed with on December 1; testified that, during the 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, and interviewed with on December 20. testified that "again, there was the talk of 'more like an IG's office,'" and was questioned about vision for SCI and what he would change. said responded by noting that "SCI is not a tear-down." gave high marks, and wrote that "provided keen insight into challenges within SCI and desire to fold SCI into DOI and the many advantages – and challenges – in doing so." also rated highly: notes indicate that "knows what should be changed." was selected for the promotion on January 5, 2018. A "personal action request form" on that date indicates that new title would be "First Deputy Inspector General." 13. Retires, and DOI Begins the Takeover of SCL. last day was December 8, 2017. During his final week, Commissioner Peters to discuss DOI's plans for SCI. Commissioner Peters testified that, during told him that merging SCI into DOI was a bad idea and urged him to let that meeting, both on a provisional basis in January 2018 and on a final basis in March ultimately cleared clearance communications, he indicated that 2018. In both of was being cleared for the "Special

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Commissioner of Investigation" position.





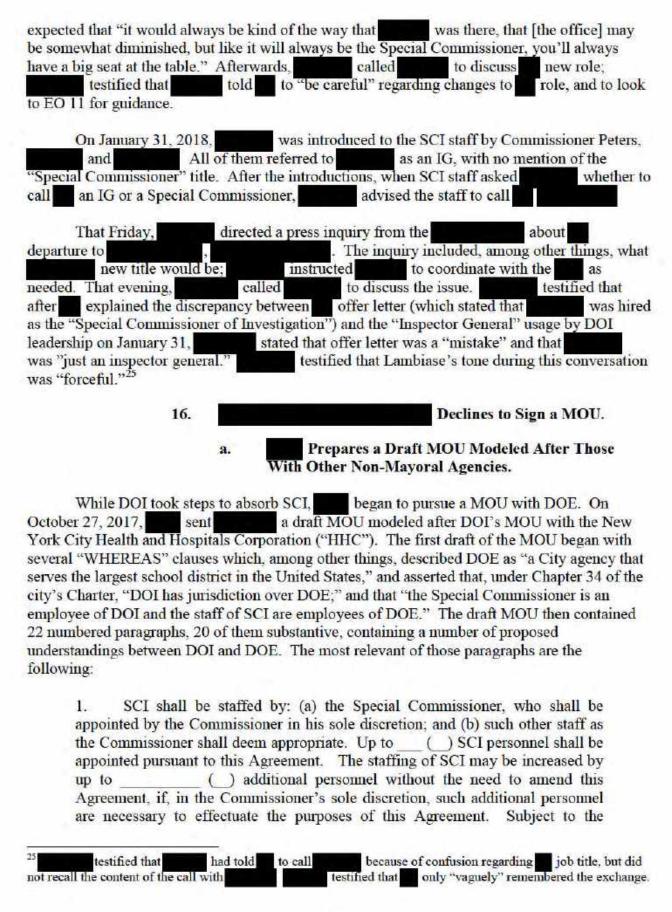
²⁴For example, DOI senior staff had decided that SCI peace officers (i.e., the law enforcement agents of the agency, who are authorized to carry weapons on duty) would have to be recertified pursuant to DOI's requirements for peace officers. But DOI's peace officer program effectively required New York 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 During this time, Commissioner Peters spoke with 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, had become familiar with DOI's overall mission. However, hoped to use his elevation as an opportunity to reset the relationship between DOI and City Hall, which believed had grown "strained." On January 27, 2018, and Commissioner Peters spoke for approximately 45 minutes; Commissioner Peters wrote an email summarizing the call. The email recounted Commissioner Peters' view that 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 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. 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]." agreed he did indeed want to be "told about such hirings going In an interview, 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 also testified that he asked Commissioner Peters for an weighing in on the new hire. 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 Title first day on the job was slated for February 5, 2018 - before which confusion title and role continued to persist, at least on about end. was invited to visit DOI and meet the SCI staff before official start date. had been named as During the phone call inviting learned that in, met at first deputy. on January 23, 2018. told about Commissioner Peters' comments during that during that discussion, interview (i.e., that Commissioner Peters wanted to treat SCI more like an IG's office), and that DOI planned to give an IG title. testified that, at that

testified that

thought that the IG title would be an internal one.

time.



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.

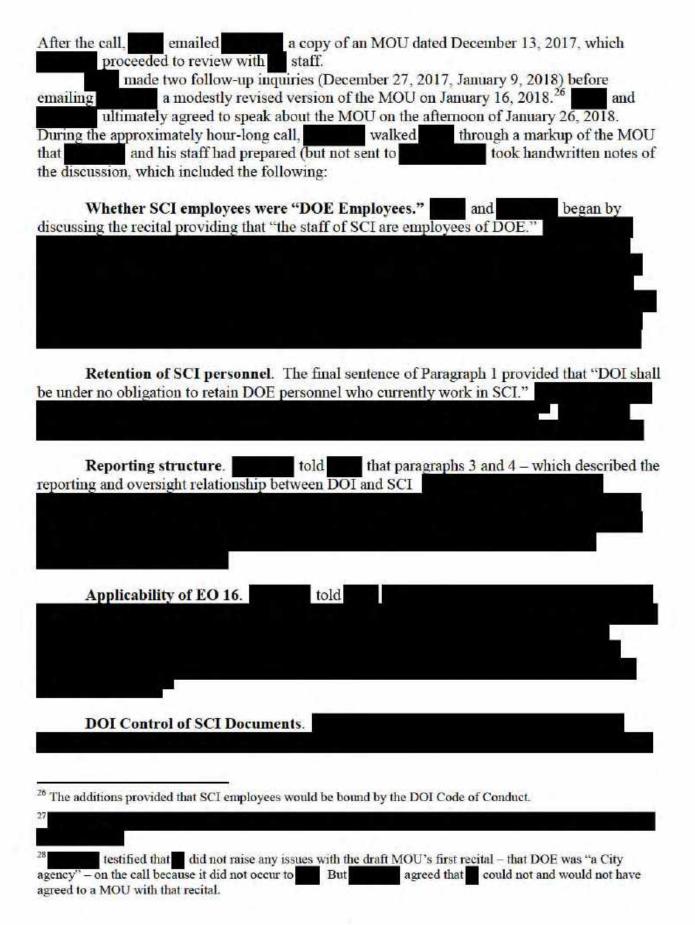
- 2. The Special Commissioner shall continue to be an employee of DOI. All other SCI employees shall continue to be employees of DOE. DOI shall be responsible for payment of the salary and benefits for the Special Commissioner. DOE shall be responsible for the payment of the salaries and benefits of the other DOE may, consistent with the terms of this Agreement, seek SCI staff. 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.

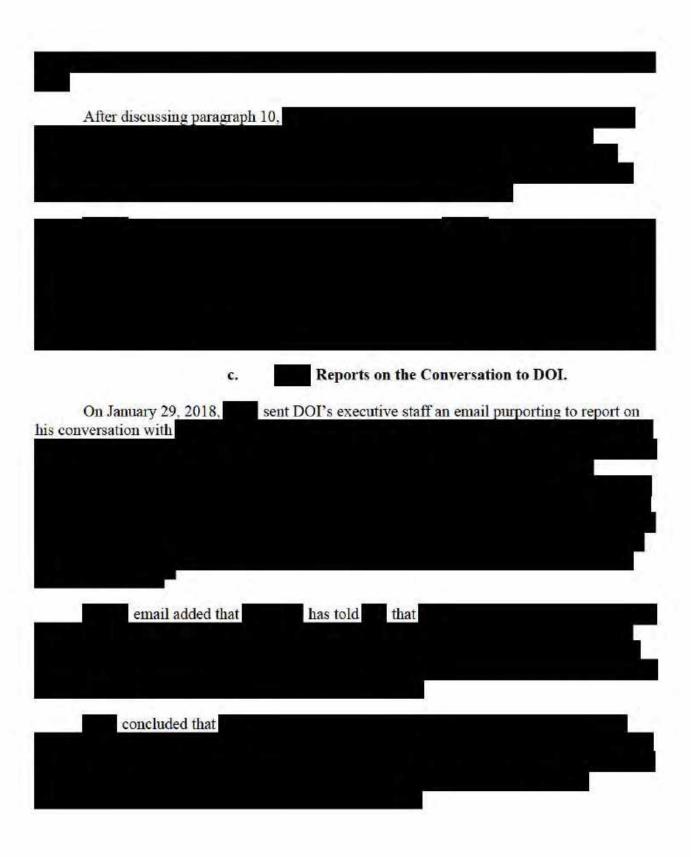
- The Special Commissioner shall provide the DOE General Counsel or the 10. DOE General Counsel's designee with access to all original records of DOE (deemed to include documents from third parties received in the normal course of business by components of DOE other than SCI) that are being retained 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 and 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) 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.

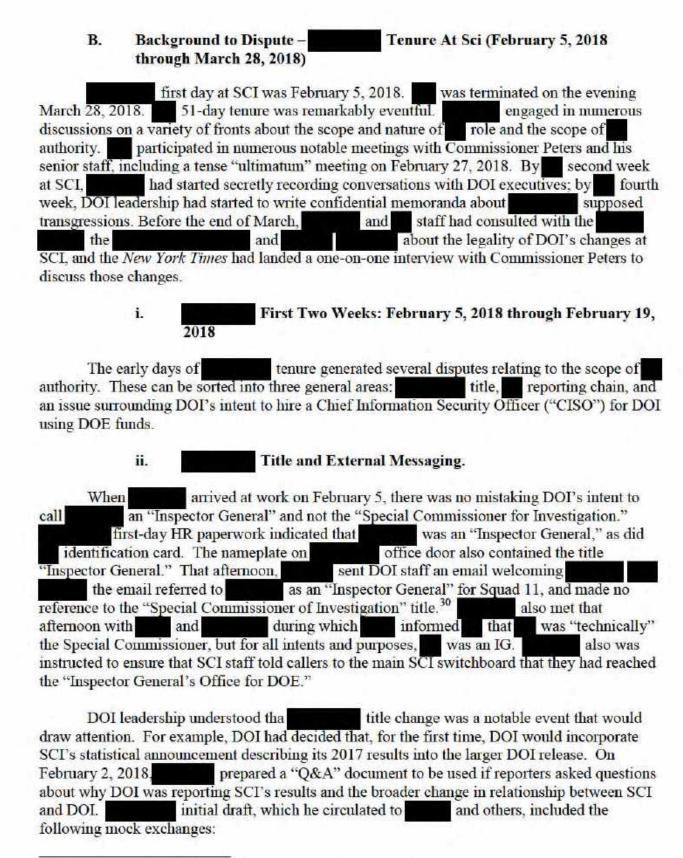
b. Explains the DOE's Objections to the Proposed MOU to

call	ed	on December 15, 2017 and told	that had a
proposed MOU tl	nat was similar to those that	t DOI had with other "non-Mayo	orals."
generally recalled	telling that, whi	ile SCI had had two prior "strong	g commissioners,"
DOI wanted to go	in a different direction and	d desired to bring SCI into align	ment with DOI's
practices.	recalled being surprised	I that was so open with	about DOI's goals.





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



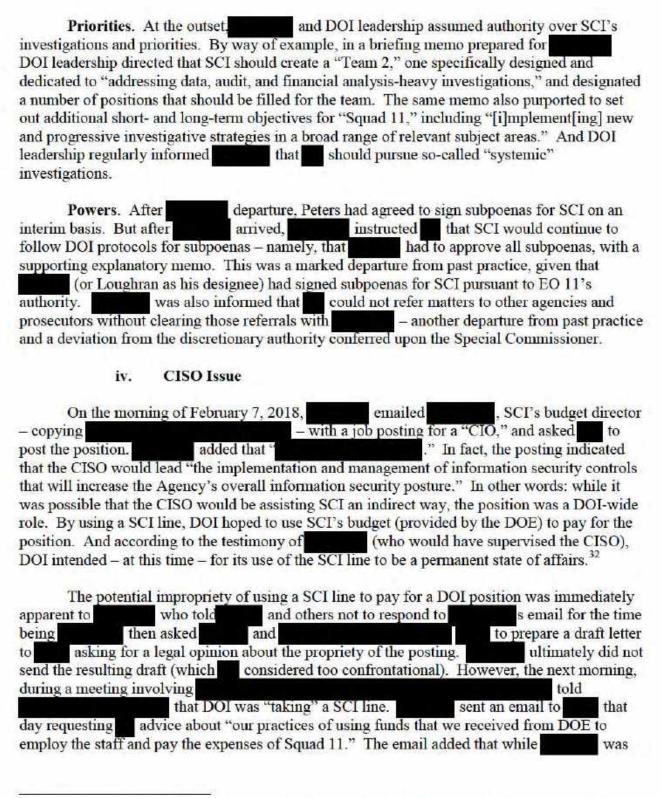
³⁰ The email was not actually received by SCI staff, whose conversion to DOI email addresses had apparently not been finalized.

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.) 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." title continued to recur, not least because DOI had either The issue of 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, made inquiries of DOI leadership as to what title should use on business card, LinkedIn account, and elsewhere - inquiries that apparently irked DOI senior staff. As late as March 12, operations team continued to debate whether and formally had a "senior title" for city reporting requirements.³¹ iii. Reporting Structure and Powers. On February 7, 2018, DOI announced the promotion of to an Associate Commissioner role, and that would be reporting directly to Formerly one of the two IGs of Squad 5, had never previously been informed would be reporting to an Associate Commissioner, or to in particular. and others) began to direct At this point, DOI leadership (through 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 ultimately communicated to that DOI had the authority to hire and fire SCI's staff. explained in an email to (1) "on a monthly basis . . . the Mayor's Office requires DOI to provide updates on all recent hire of senior staff titles"; (2) "civil service title is listed in the city's office title is Inspector General"; and (3) "the Mayor's databases as Special Commissioner," even though "

name." volunteering that "if we don't include her as one of our senior title s] it may open us up to possible scrutiny."

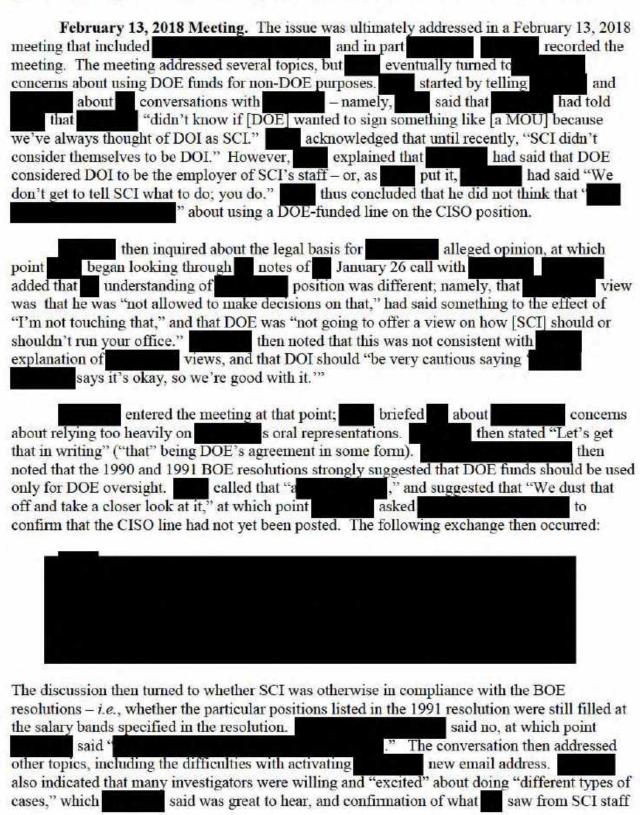
Office [was] asking [DOI] to include

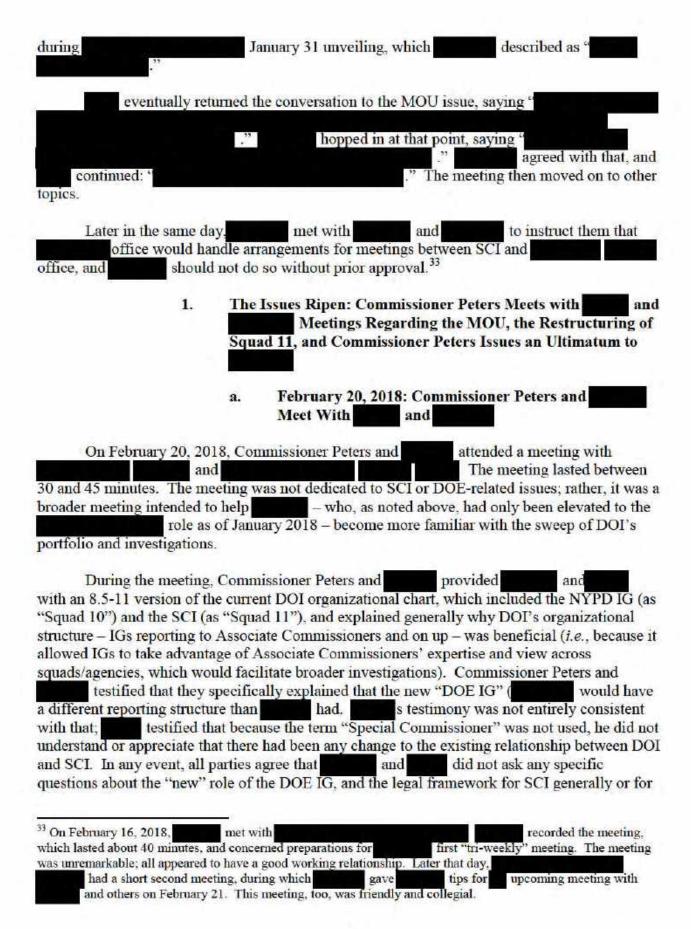
then commented "What a conundrum" before

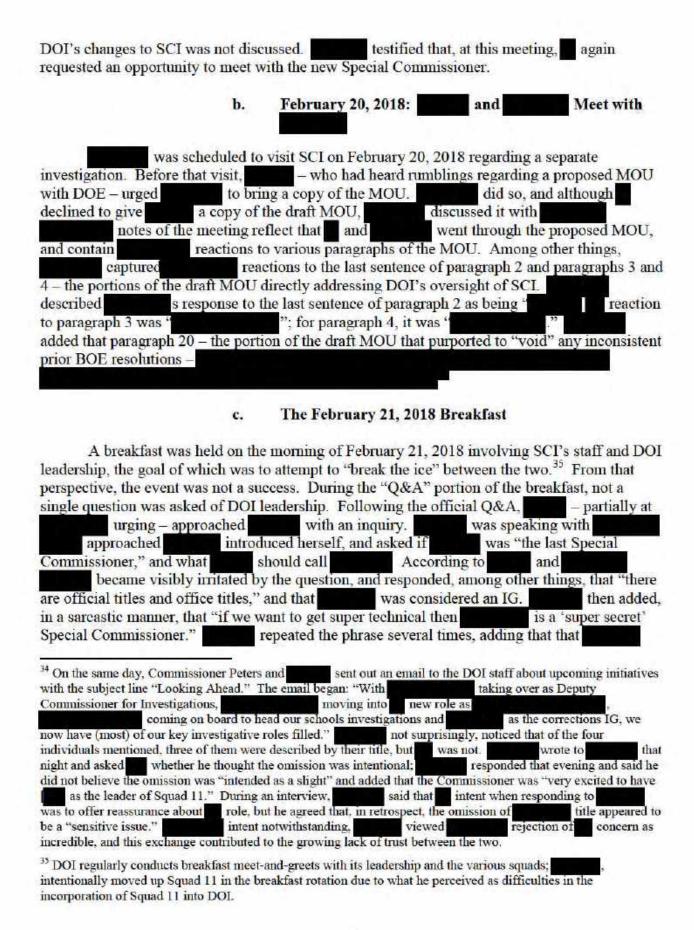


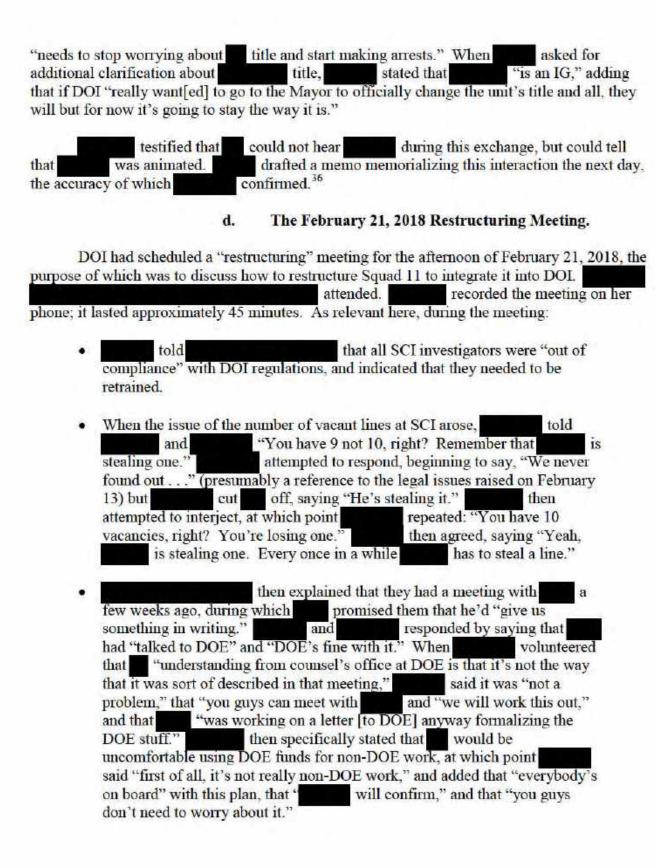
³² Some witnesses testified otherwise. Commissioner Peters testified that he believed that the use of the SCI line was always intended to be temporary. testified that DOI planned to seek funding for the CISO position from OMB in the DOI budget and thus hoped that DOI's use of the SCI line would be temporary, 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," want[ed] to be sure that our practices moving forward are consistent with" EO 11, the 1990 and 1991 BOE resolutions.

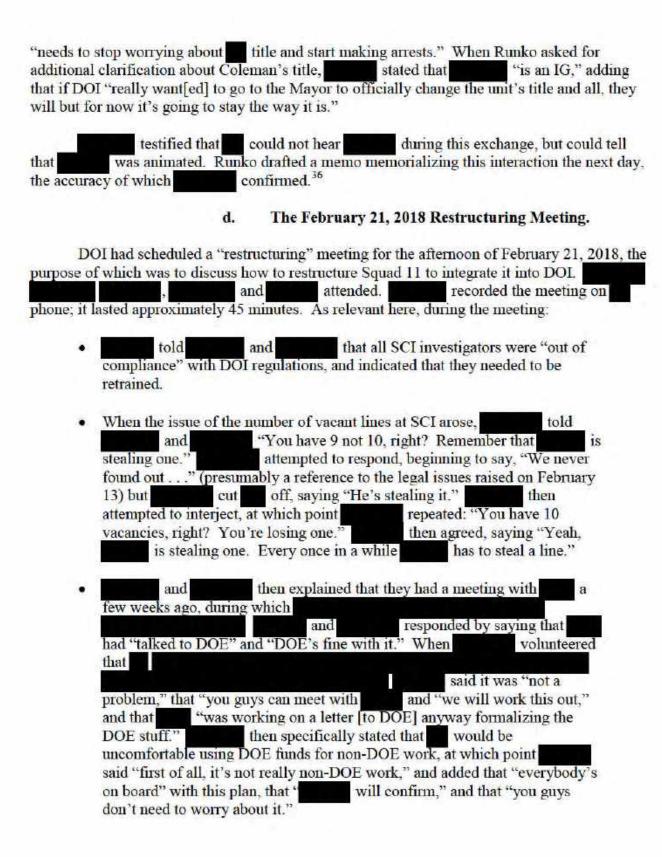






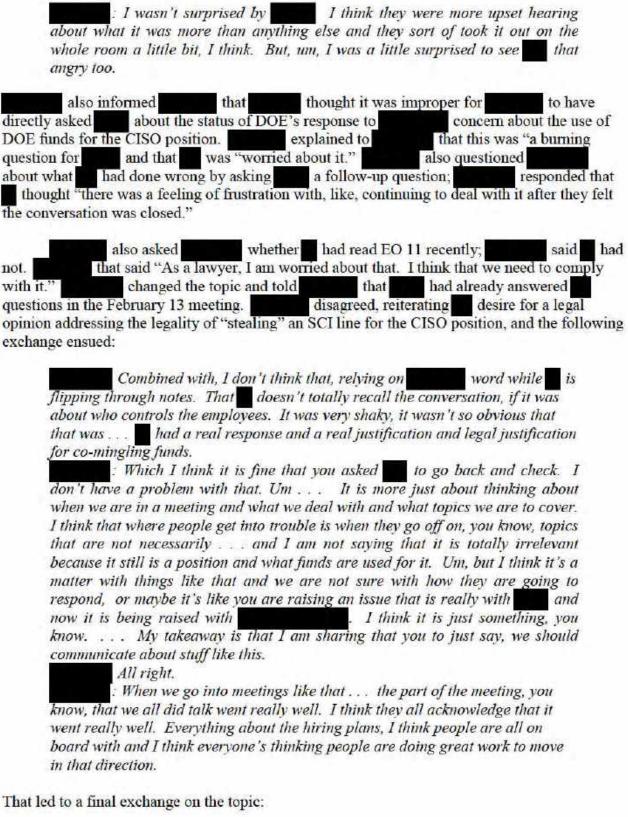


testified that did not recall the interaction at all, or who



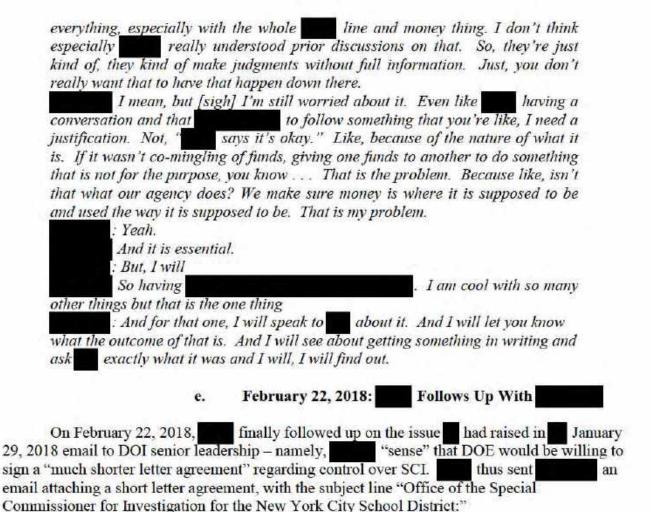
testified that did not recall the interaction at all, or who

po dir co	estings get approved first by and then by then to make sure that SCI's HR person was cordinating with and the sure that sci's hr person was to make sure that sci's hr person was the make sci's hr pe
on Do	then entered the meeting, prompting a discussion about SCI staff's agoing reluctance to provide their personal email addresses for purposes of OI's "continuity of operation" or "COOP" plan in case of an emergency. ultimately stated that SCI staff should have to provide their addresses as condition of their employment. The "personal email" issue had not been on the meeting's agenda; and all appeared to become intated about SCI staff's refusal to comply with this new directive.
o's presa	fter several minutes of discussing the COOP email issue, "Did, um, DOE get back to you about the, you know, the question that e had about the" At that point, clock interview," and jumped in to say "will circle back," ompting the meeting to conclude. As the group began to pack up, id "I'm just worried about it." said "Yeah," and both and said "All right." tone was neutral and professional; d not raise voice or in any way act unnaturally. did not answer question.
	had not in fact followed up with about the legal issues discussed at February 13 meeting. The basis for statement that "DOE's fine with it" ar sentiments expressed during the meeting remains unclear.
"restructuring had gone very agenda – like "likes to keep	bebrief. Later that day, who had a de-briefing meeting with which recorded. Who had spoken to and after the area that the substantive parts of the restructuring discussions well. Cautioned about discussing issues that were not on the meeting the COOP email issue – with and because DOI leadership the meetings tight." called it a "really small miniscule example" of a reveryone has to figure out how to deal with." That led to the following exchange:
Some itself i discus I don'	: I think, that and are doing a really great job in a very enging situation because there's a lot of different stuff to be dealing with of it is changes and some of it is learning the existing structure, and that is a difficult thing. I don't want to see little things like the personal email is sion, like sidetrack people's views of how well everything actually is going, it want them to get bogged down in a little thing like that. Like, I really think all have dealt with. Gotcha. It seemed to piss off seemed pretty angry.
	: Yeah And I was like, sorry, I wasn't trying to cause trouble here.



Voul but I do count or

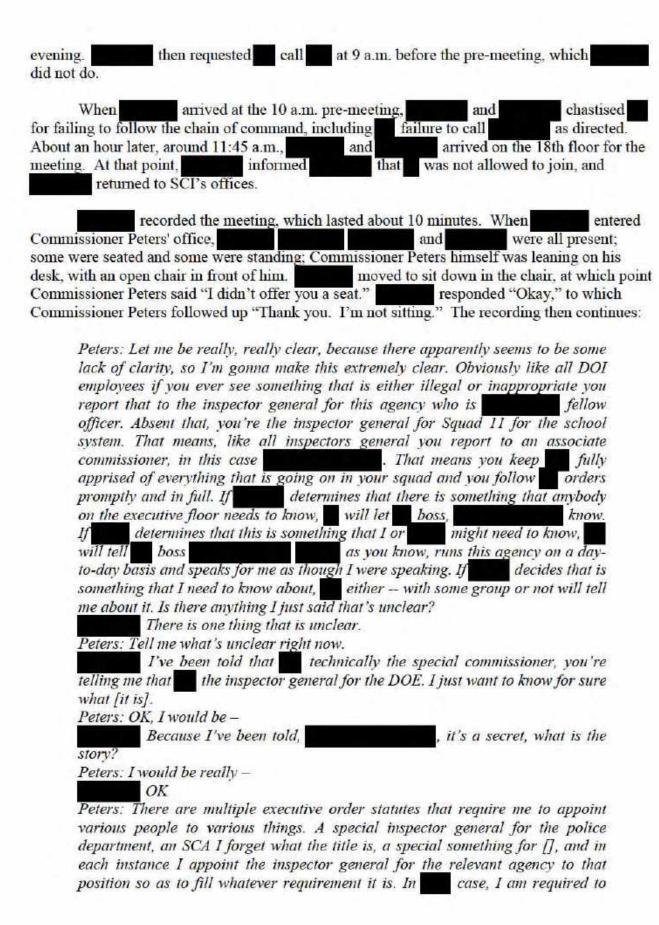
: Yeah, but I do want you to know, it actually went really well until we started kind of taking on these other things and um, part of it is, they don't know



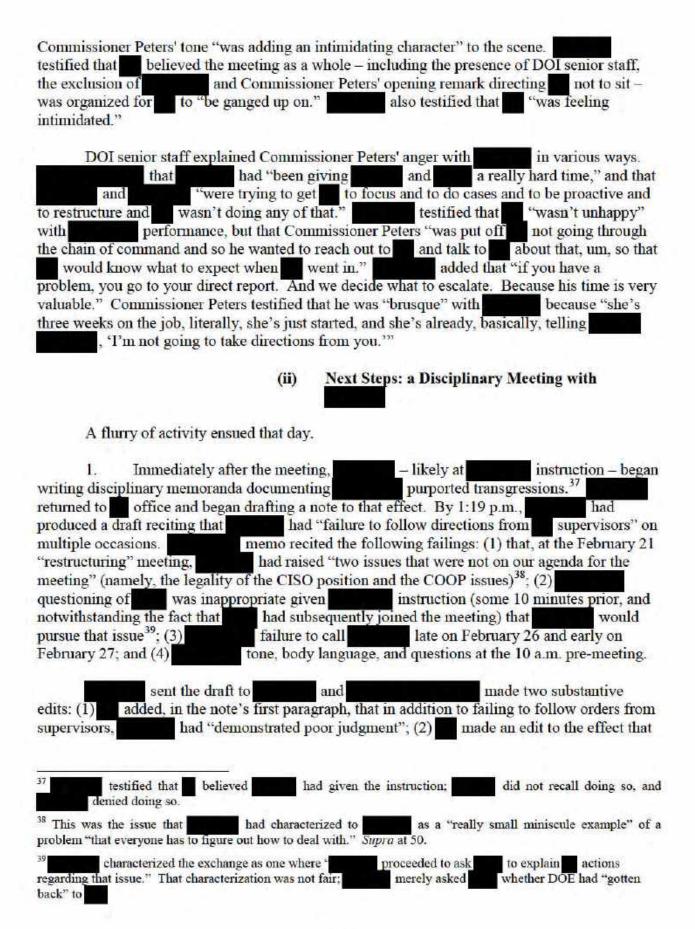
Dear

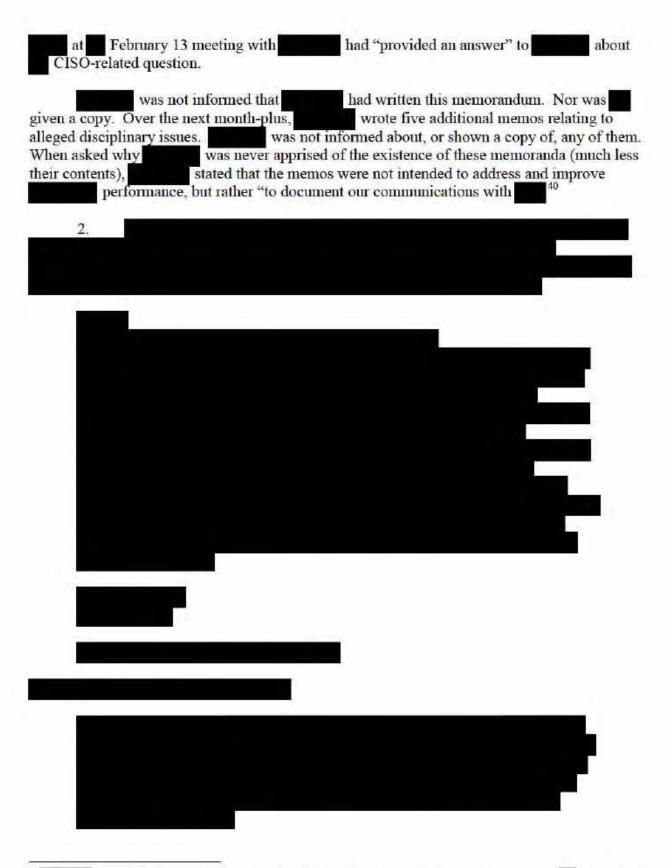
Further to the conversation we had on January 25, 2018, this will confirm certain understandings between the Department of Investigation (DOI) and the Department of Education concerning the Office of the Special Commissioner for the New York City School District (SCI). As we discussed, DOE acknowledges 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 unders and confer on an as-needed basis and the resolutions as may be necessary with appr	DOE shall adopt such policies, rule or
Please have the indicate indicate aforementioned understandings by signing	acceptance and agreement with the gwhere indicated below
paragraph – one minor, one major. strictly accurate that DOE had in fact "procure[d] was that the letter was written "as if DOE is agree	eing about what the proper relationship is we an opinion" about that topic, and "didn't
caveat into all assertions of DOI's authority – nan "as between DOI and DOE." redraft position as between DOI and SCI as to whether D re-draft to rather, the two eventually dis-	also included a new sentence: "DOE takes no
f. The Februa Context.	ary 27, 2018 Ultimatum Meeting and Its
(i) DOI	Meets With Commissioner Peters and Senior Staff.
had three notable meetings on Fe was set the prior day — Peters' assistant to request a one-on-one discussio mounting concerns over the legality of various ch calendar invitation that listed all of DOI's senior of Commissioner Peters directly to reiterate desired	anges at SCI. received in response a staff. then followed up with
As has been explained several times, you reports to who reports to me. I will Best, MGP	report to , you report to , who ll meet with all of you tomorrow morning.
had requested for a one-on-one meeting.	to express their dismay that recalled that and a "self-inflicted wound." also set a vards, left a voicemail and responded that was not available that



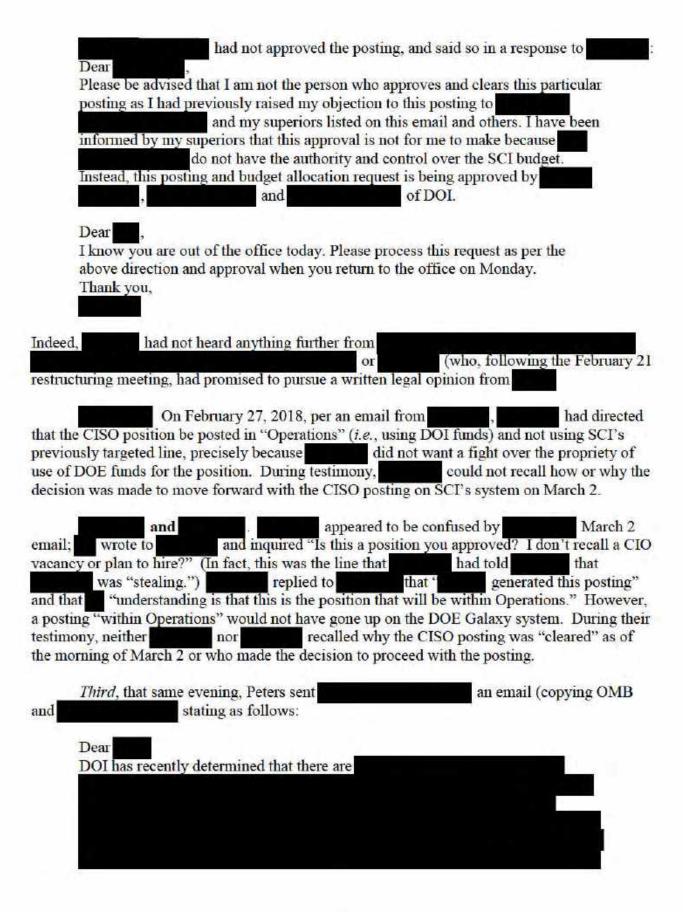
s s	ppoint a special commissioner of investigation for the city school district. And I ave - And in capacity as IG I've appointed as such. Like the executive order says that that person is a deputy commissioner, that person reports to me, is elected by me, and serves at my pleasure. That person reports to me through whatever surrogates I choose. Those surrogates are, as I just laid out for and then and then are the title, I'm not a big seliever in titles. There is a legal requirement that I have a special commissioner
to the second of	So wait, so, I don't get it. So appointed as an inspector general of the school system, but acting as a special commissioner or 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, ffort, and energy. It inspector general for the school system. It is still an executive order that I haven't bothered to have liminated that says I have to appoint one. So I appointed one. In the same way that I appointed as the person who will do certain functions that the city Council spelled out in terms of Rikers, and I've appointed to whatever it is the SDA ays, though we fixed that. It used to be that had to have a second title too. You are the ins-I have to appoint somebody with that title, I appointed somebody, appointed my IG to have that title, all that goes with it. All that goes with it, if 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
1	ou. You report to Okay.
t	Peters: I'm not gonna spend any more of my time that I already spent on this. I hought it was made clear, now I'm making it excruciatingly clear. Is there mything now that is confusing?
<i>f</i> 1 1	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 ou 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. All right, I want to talk to
(Emphas	is added.)
meeting brusque	testified, and the recording confirms, that Commissioner Peters' tone during this was stern and dismissive. Commissioner Peters testified that he was "deliberately with and that he would not disagree with the description of "intimidating." testified that "was taken aback by the tenseness of the room."



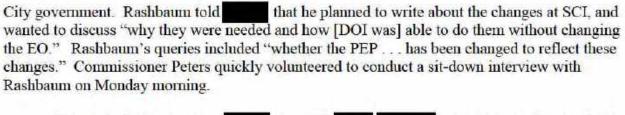


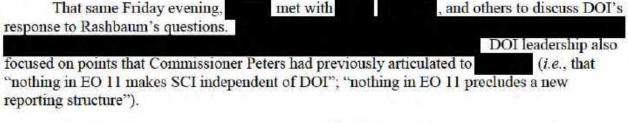
agreed that the memos were not "disciplinary" in nature, testifying "They were not for memos I put in my file to document what happened."

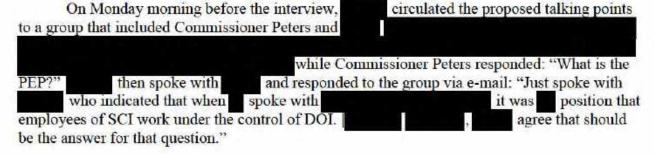
3. At 3 p.m., was called to a disciplinary meeting with and that was to be "formally" written up for the chain-of-command and tone issues described in memorandum of the same day. requested a copy of those written charges so that above, no written charges were ever provided to
4. At 5 p.m. that day, returned to Commissioner Peters' office and informed him that wanted to keep job. Commissioner Peters instructed to follow directions, adding that, if was notified of any acts of insubordination, "would no longer be employed by DOI." testified that believed that Commissioner Peters' message and tone during this meeting was intended to intimidate
8. Before the Termination: Events Through March 26, 2018.
a. Early March: Further Developments on the CISO Issu
Toward the end of the week of February 26, DOI took steps to document its position vis à-vis the issues had been raising.
First, on March 1, 2018, Commissioner Peters drafted a memorandum to file memorializing his February 20, 2018 meeting with and 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 and offered no concern about this structure and I provided them with copies of the Org Chart.
and agreed that Commissioner Peters' recollection of these events was factually accurate, but testified that, because Commissioner Peters provided no context for the changes a SCI and did not raise any issues surrounding the legal authority or framework for the changes a 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, sent an email to sent an email to instructing to move forward with the posting of the CISO position on DOE's Galaxy system. email asserted that the posting "has been cleared and approved by all parties cc'd on this email" – a group that included a group that



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. 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. 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. (who prepared the first draft of the email to 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 informed 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." ultimately posted the CISO position on Galaxy on March 9. However, the posting lacked a position number (which would have been required to hire). followed up with the DOE on several occasions over the next week seeking a position number; continued to check in on whether the position number had been received. March 9 to March 16, 2018: The New York Times b. Enters the Picture, and Hears Back from DOE. On the evening of March 9, 2018, informed DOI leadership that had received a call from Willy Rashbaum, a reporter at the New York Times whose beat included New York testified that did not recall receiving this email — testified that receives dozens of such emails a day — and that if had received it, would have forwarded the email to OMB. , who supposedly told discussed the CISO funding issue with that this funding arrangement "was wrong."







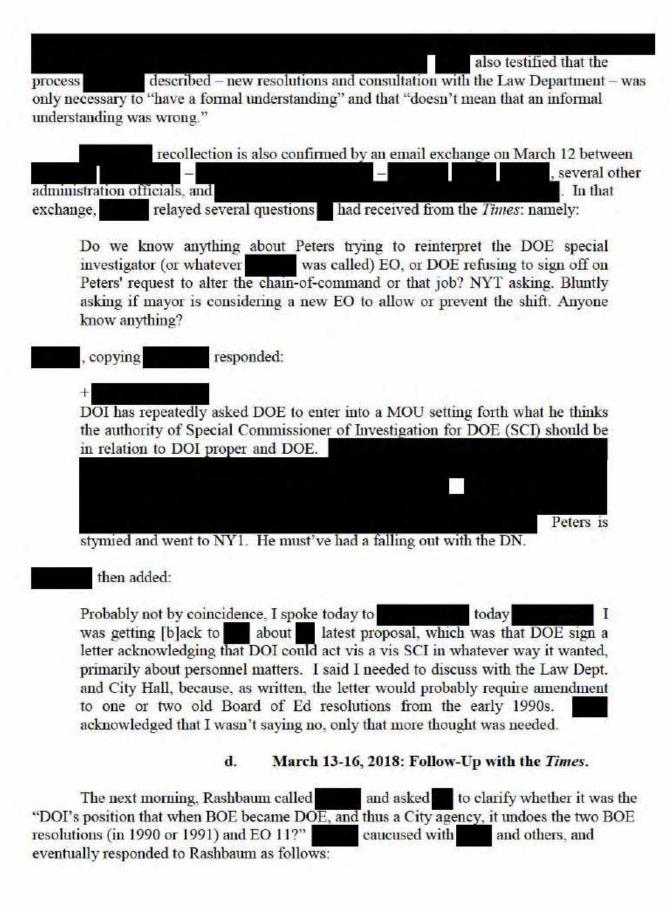
The interview with Rashbaum proceeded as scheduled at 11:15 a.m. DOI witnesses universally agreed that the interview did not go well. Commissioner Peters began by explaining the policy rationale for DOI's takeover of SCI. When Rashbaum asked Peters whether DOI planned to obtain a new Executive Order 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 February 22 follow-up letter to also remained unsigned. At that point, Commissioner Peters responded that he had not heard that DOE did not plan to sign 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: Re-Connects with Regarding Proposed Letter Agreement.
Later in the day on March 12, 2018, about the proposed February 22, 2018 letter agreement with DOE. took notes of the call. explained explained 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 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). 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 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, asked how much time would be required to obtain new PEF resolutions if needed; said "thought a few months." recalled that tone made think was "unhappy," which was a new development; up until that point,
had not perceived to be displeased with the pace of their discussions. notes are consistent with recollection. 43 Among other things, the notes say
explained that, after reviewing the February 22 letter, was unsure about how to handle the secon paragraph's proviso requiring DOE to "adopt such policies, rule or resolutions as may be necessary with appropriate consultation with DOI." ultimately concluded that DOE could not agree to this language as draft because neither nor could preemptively bind "DOE" to actions that would require Plapproval, which changing the "DOE's" position as to SCI might well do. As put it, "Two chickens can agree to get together and agree to do something that the law says something there's a process to do that involvement than them I couldn't sign it the way it was written."
recalled sitting in on a single call with and and was confident the call took place after started; this is the only exchange that fits that description. However, did not have a clear recollection of what was said on the call.



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 to fulfill both of those roles.

Rashbaum had a second question as well: "whether and fire, to compel testimony." and and prepared a draft response for DOI leadership's review, which 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 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 a sked 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 descriptions of telephone conversations with 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

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 had sent 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, and began to relay their concerns to individu	During this time,	and	began to relay their concerns to individ	luals
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⁴⁴ Though DOI did not know it at the time, DOE's comment was largely drafted by 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, attempted to schedule time to meet with City Council Member, Brad Lander. On February 23, 2018, sent Lander an email stating, among other things that: 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. eventually met with Lander on March 15, 2018, at Lander's office. During that told Lander that believed that DOI's takeover of SCI contravened EO 11 and the BOE resolutions, in particular with respect to the CISO hiring. On the Monday morning following Rashbaum's *Times* article – March 19, 2018 left a voicemail for asking to discuss situation. back the next morning, and then called called again that afternoon to request come to a meeting at City Hall the next day, and "bring something in writing" if that possible. and then worked throughout the evening to put together a rough draft of a memorandum describing the changes at SCI.46 and arrived the next morning, draft memo in hand, to meet with joined, which had not anticipated. The meeting lasted for more than an hour, during which time relayed the details of their interactions with and DOI leadership. According to and seemed surprised by what they heard. Toward the meeting's end, moted that was in a difficult situation from a whistleblowing perspective, because the law directed to bring a whistleblower complaint to put it, "I can't report Mark Peters to Mark Peters." responded to by telling that "We're going to figure this thing out," and telling that they were "on the front lines."

what direction this was going." also testified that, upon review of EO 11, the BOE resolutions, and the Gill Commission's report, it was clear to as a matter of law that Commissioner Peters "did not have the unilateral authority or capacity to change the relationship between [SCI] and DOI." added that told as much; namely, testified that 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

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

Council's Committee on Oversight and Investigation for a hearing on DOI's proposed 2019 budget. and also attended; also attended; along with 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:

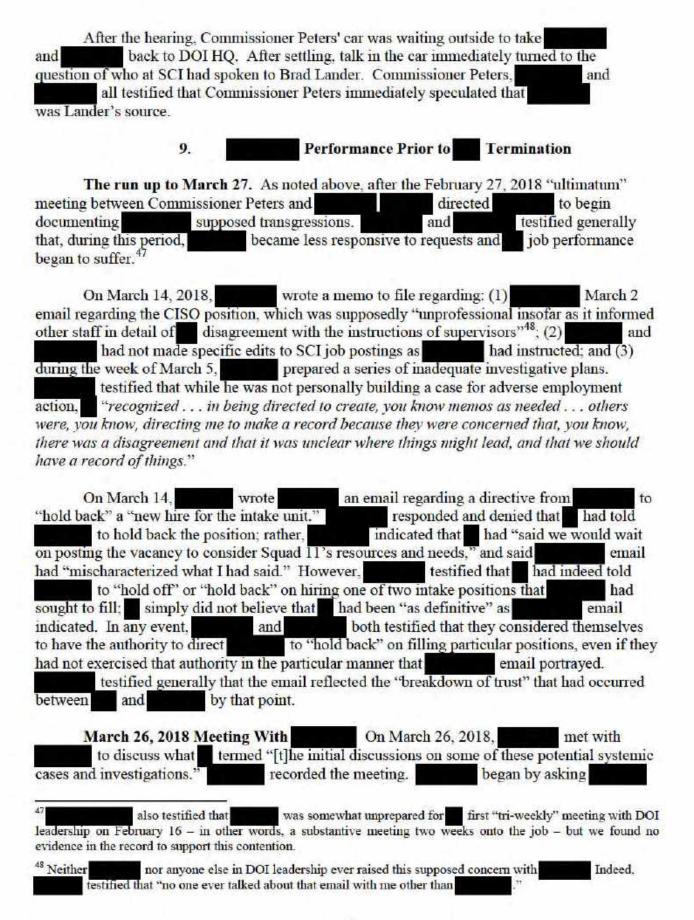
Well, by law they are, will always technically be called the "Special Commissioner [of] Investigation[s]. They are also called the Inspector General for DOE. That strikes me as a bit of nomenclature. I tend to refer to it as the IG because it is important that we have consistent work across the line.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

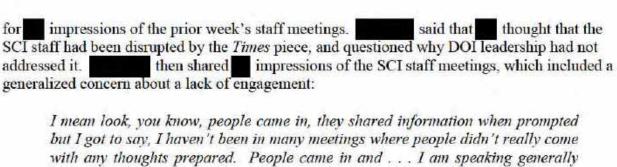
Torres then began to ask about the reporting structure for both the NYPD IG and SCI, at which point Commissioner Peters explained DOI's overall reporting chain, which Commissioner Peters termed "an extraordinarily efficient model for handling cases."

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."





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.

and

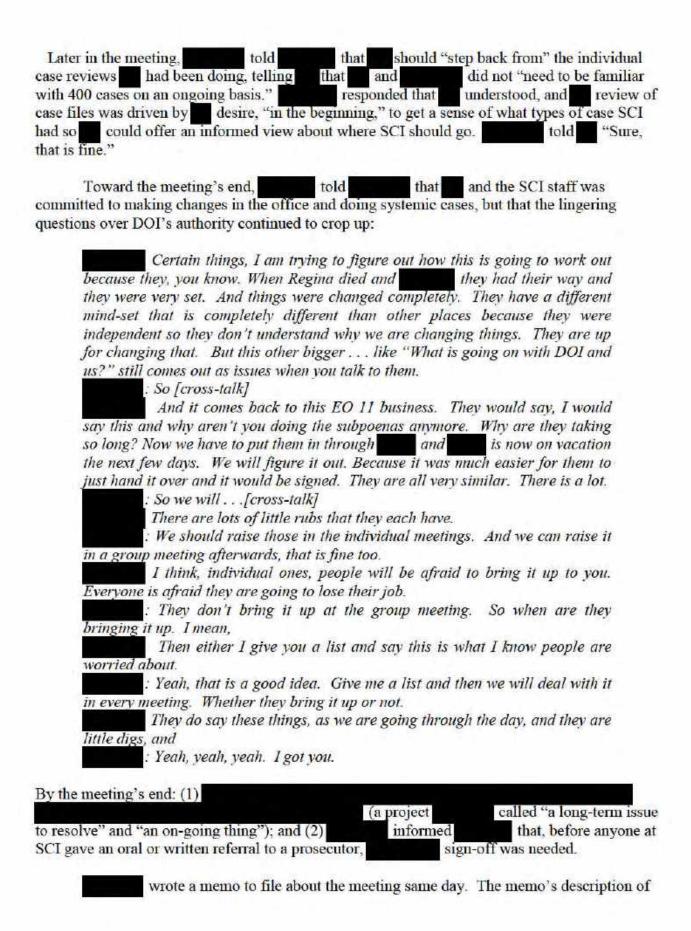
then said that this lack of engagement was not acceptable, and that

needed to work through any resistance to the changes at SCI with the staff. At that point, told 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. 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." corrected noting that EO 11 "doesn't reference the Inspector General of the Department of Education." 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, eventually told

It's not your job or 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 We should clarify people's uncertainties about things, this. EO 16 that. 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 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 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 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.

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



the meeting was largely accurate, with one exception.	memo states that told	
that it was "responsibility to manage" the SC		
and the unit's independence," that "asked if	felt will be able to handle this	
responsibility as the leader of the squad," and that "		
recording of the meeting shows that while	d these concerns to and that	
did indicate that (along with	should manage those concerns,	
did not request (or receive) approval	for that plan of action.	
The March 27 Meeting. Later on March 26,		
regarding desire to meet individually with SCI	's investigators "to discuss the	
realignment of the squad and their role/responsibilities."	also agreed, as had been	
discussed, to pull a set of "clarifying questions that [had] b	een raised in various ways."	
sent the list of questions to midday on March 27	via email:	
A		
Dear leading,		

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:

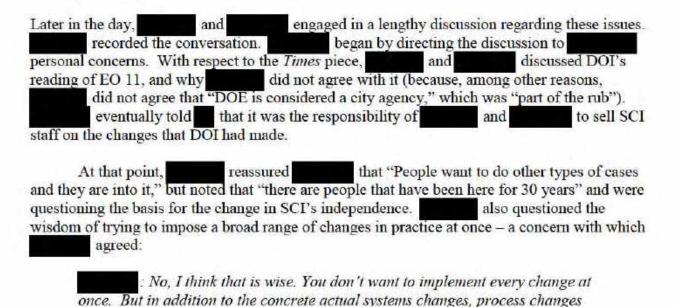
- We've always used EO 11 to seize documents, compel witness statements and subpoena records — are we not using that anymore? Are we using EO16 instead?
- Worried that some school superintendents, principals and teachers will soon not provide documents as per EO 11 because we are not using EO11 and then will not provide docs and or we will have to subpoena every document.
- 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.
- People have asked me why I report to you and that I should only be reporting to the Commissioner.
- 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).
- Fleet management people are upset about the plaque and car issues and DOI continues to manage the fleet.
- 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.
- 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:

- 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
- 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 sent over; it was my understanding from our meetings that was sending over a letter confirming their conversation for the to sign not to sign.
- 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.

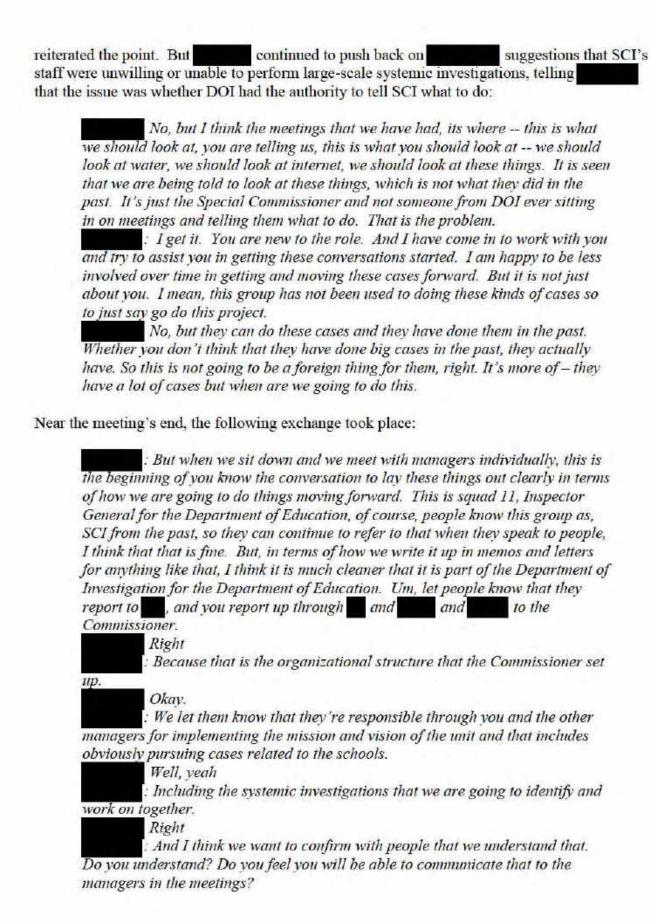
Looking forward to discussing. Thank you,

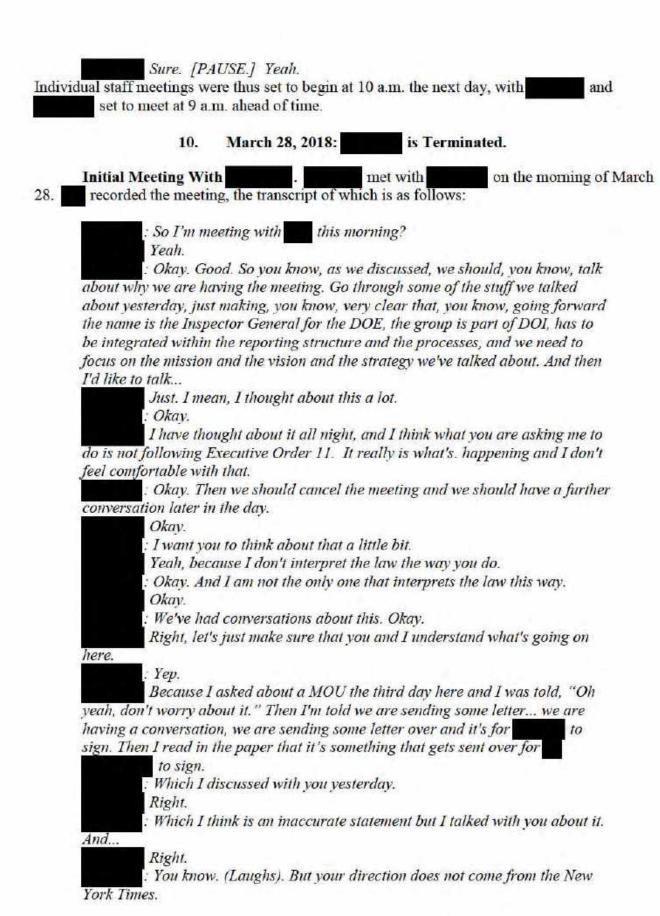


that get made, for something like that, like closing memos, or the fact that

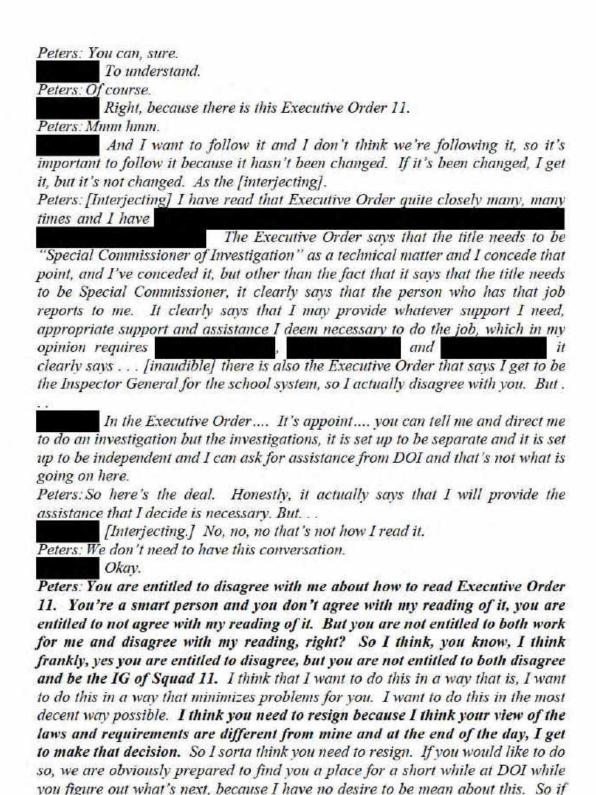
evaluations are going to happen -- there is a larger mindset or perspective that needs to be changed as well. And for me, that's a big thing because these other little changes . . . like every time you want to change a closing memo or do evaluations, you're going to run into challenges in implementing 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.

pervasive and manifests in different ways, like that is a huge thing that needs to be thus explained that, from 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: 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? : 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. [...] 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. : Right So, forget about the historical knowledge and just tell them, no, there is an IG of DOE? : That's what they are now. The Inspector General of the Department of Education. SCI no longer exists as a name. 50 appeared to assent to delivering this message, telling that "We probably should" communicate that message to staff in individual meetings, and agreeing when 50 That was a bit strong: clarified later in meeting with that SCI "can be used as a legacy name" because "g[o]t that people are used to that is what it is called." 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." also asked whether the "Chancellor's Regs" would be updated to reflect the name change; did not appear to have any understanding of what those regulations were, and asked to send them to





ana	ction from reading the Executive Order 11 and there has been conversations at why don't we go change the Executive Order 11? It hasn't been changed
	it is still in effect, right? So you know, you keep talking about yesterday
	kept talking about "Hey there is some line in the very beginning" and I
	back and read it, you know about the purpose, and it refers to this March
	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
	: Separate from whom?
	From DOI and DOE. Do you want to see it?
	: Send it to me.
	Send it to you? I mean, did you read are you following? Are you
look	ing at the law yourself because
	: [Interjecting.]
	I just, I am really upset.
	: This meeting, this meeting is over. Okay.
	Right, it is over.
	: We will talk later today. I want you to know.
	We should
	: You can send that to me and we will talk later today.
	Sounds good.
	th SCI staff as envisioned due to different understanding of what EO at which point terminated the meeting. Second, said nothing at
all about a	efusal (or view one way or another) to make any of the policy changes that DOI (i.e., focusing on "systemic" cases).
all about a renvisioned about man min doing so	efusal (or view one way or another) to make any of the policy changes that DOI (i.e., focusing on "systemic" cases). Goes to DOI Leadership. immediately informed DOI leadership eeting with While While did "not remember the exact words" used
all about a renvisioned about min doing so direction frunderstood	Goes to DOI Leadership. immediately informed DOI leadership eeting with While Word Comments was that Commissioner Peters, and all testified that they



you don't want to resign...

I don't know.

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

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	
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.	
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. Okav.	
Peters: So think about it.	
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: 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	
, 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.	
Gotcha.	
Peters: Those two are not (inaudible)	
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.	
Okay. I will.	
Peters: Thank you.	
Thanks.	
(Emphasis added).	
Next steps.	1115
Next steps. returned to office, and immediately began to draft a follow- email to memorialize views; stated with drafting the email. DOI leadersh	
called to Commissioner Peters' office, where told that	·P
TO STANDARD STANDS THE STANDS THE STANDARD STAND	
. Other witnesses' recollections were similar; recal	led



Coleman's Email. At 12:22 p.m., sent Commissioner Peters and an email (copying laying out 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 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 1G. 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 review and edit SCI closing reports of investigations and referral letters to the 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 second yesterday, 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. 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."

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

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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 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.

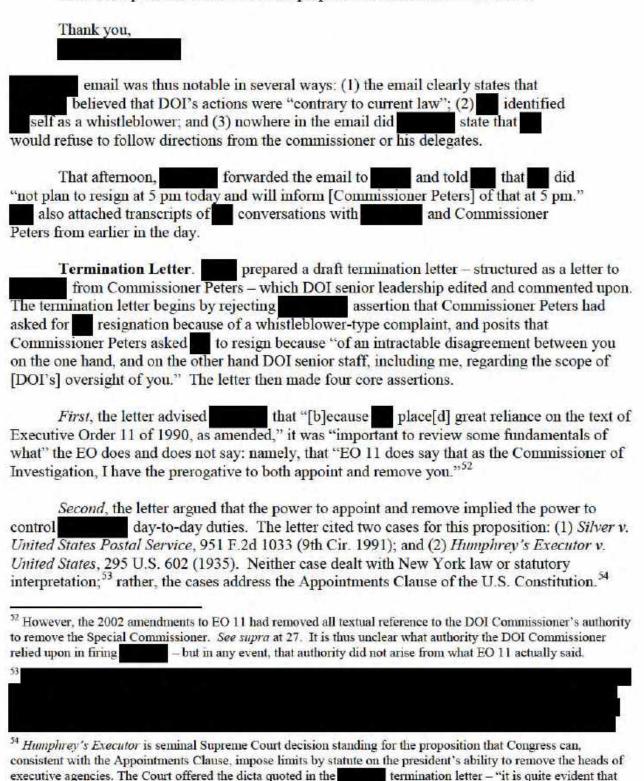
And, the daily direction and meetings called by to direct the SCI staff are not within the mandate of EO11.

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. and 1 were present in a meeting with and 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 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.

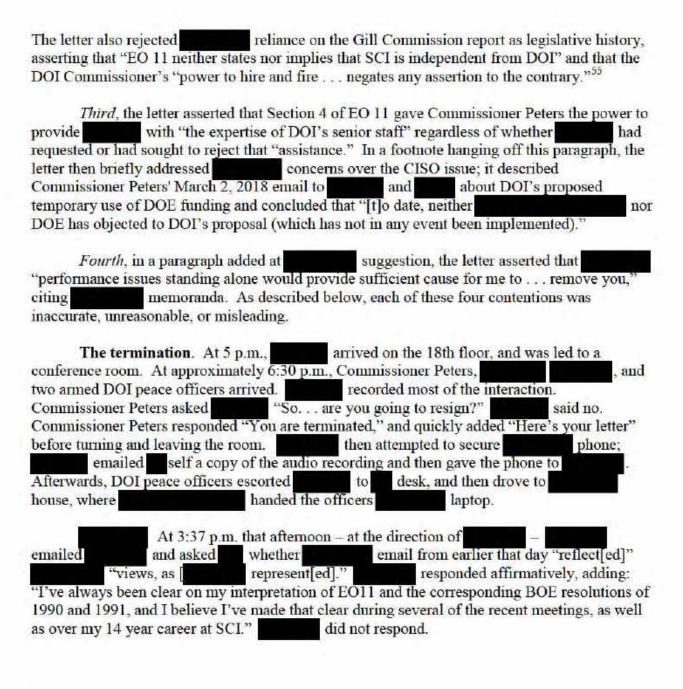
and I have made clear since the beginning of this new SCI administration that we had concerns regarding the position and actions that DOI was pursuing regarding SCI and the DOE, and that we believed those actions to be contrary to current law. We stand by those positions. It is also our understanding 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.

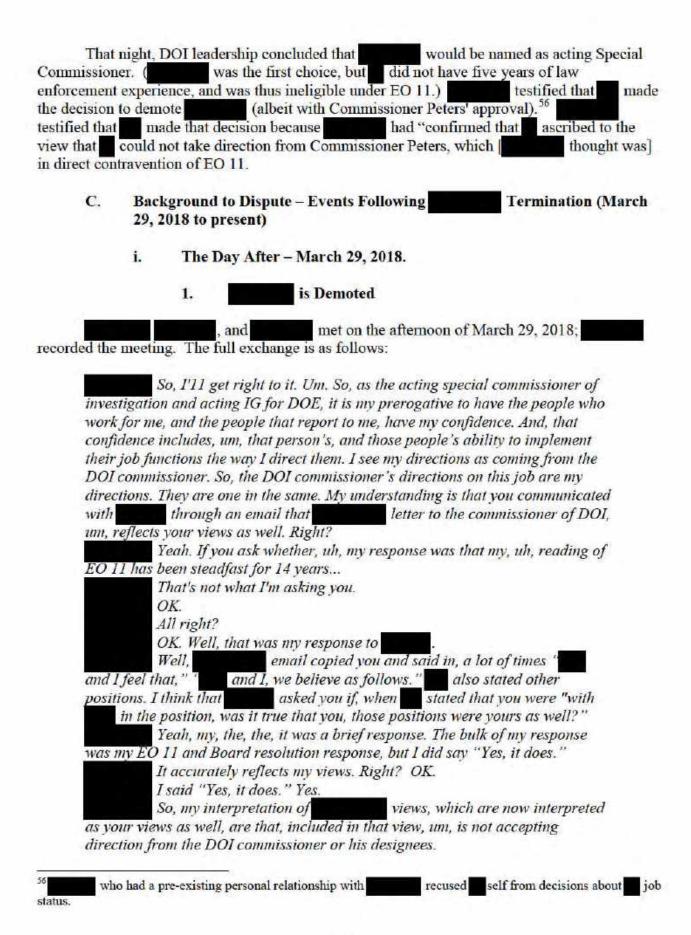


one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will," 295 U.S. at 629 – in explaining why maintaining the independence of executive agency appointees was important. Silver rejected a litigant's claim that "the President's executive powers

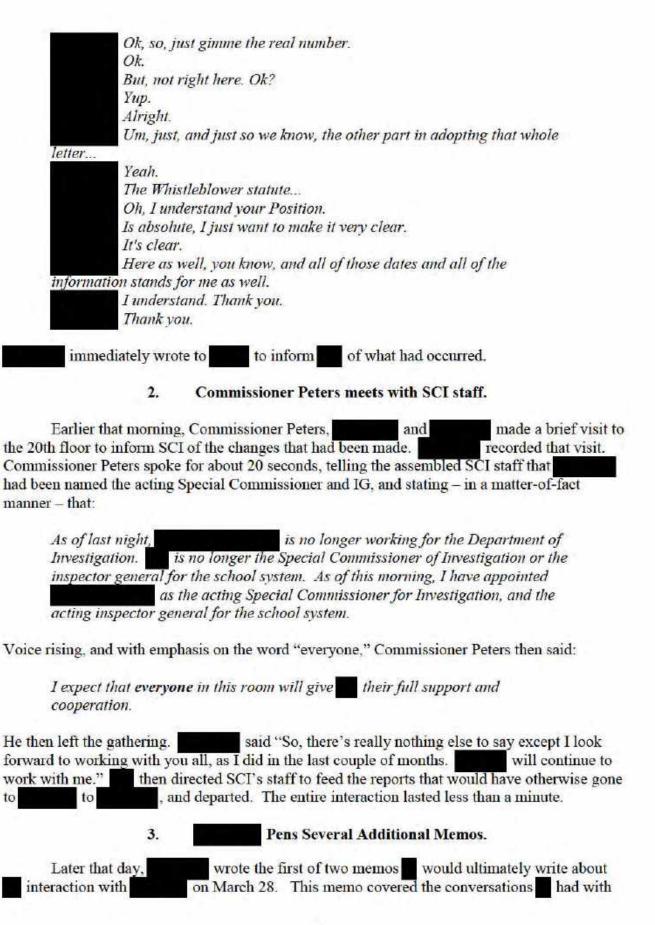


have not been properly delegated to the Postal Service in accordance with the Appointments Clause," 951 F.2d at 1036. In so doing, the Ninth Circuit considered who or what was the "head" of the Postal Service for Appointments Clause purposes; the court determined that the Postal Service's nine-member 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's not a statement that I have made, or would make, I don't know if that's fairly attributed to me, but, eh
Well. OK, so, alright. So, articulated 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?
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.
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.
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.
You know, I, I, again, I don't want to argue about interpretation of it. I
mean
I wanna, I wanna, I'm trying to see from you, 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.
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.
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
an incorrect number, you should let me know that.
■ ((((((((((



on March 27 and 28. With respect to the initial meeting on March 28, wrote that said "was not comfortable giving those directions to staff and would not give those directions to staff" (emphasis added). Staff also wrote a memo addressing demotion, which tracked the recording of the meeting – namely, that agreed with the sentiments expressed in email, and those "views were contrary to the directions of Commissioner Peters."
4. The Whistleblower Claims Arrive.
That afternoon, emailed Councilperson Lander, copying 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 identity." thus requested Lander's assistance with pursuing a whistleblower claim. separately sent and a letter requesting whistleblower protection.
ii. Fallout from the Mayor's Office.
On March 30, 2018, Rashbaum wrote an article in the <i>Times</i> describing termination, 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. The article included a statement from about the importance of SCI's independence from DOI. It also relayed a statement from the Law

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

that "[w]hile the Department of Investigation generally conducts such inquiries, it is conflicted in

Department that it had "opened an investigation into three whistle-blower complaints made

and two members of

staff," noting

against the Department of Investigation by Ms.

this instance."

wrote another memo on March 30 covering the events of March 28.

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

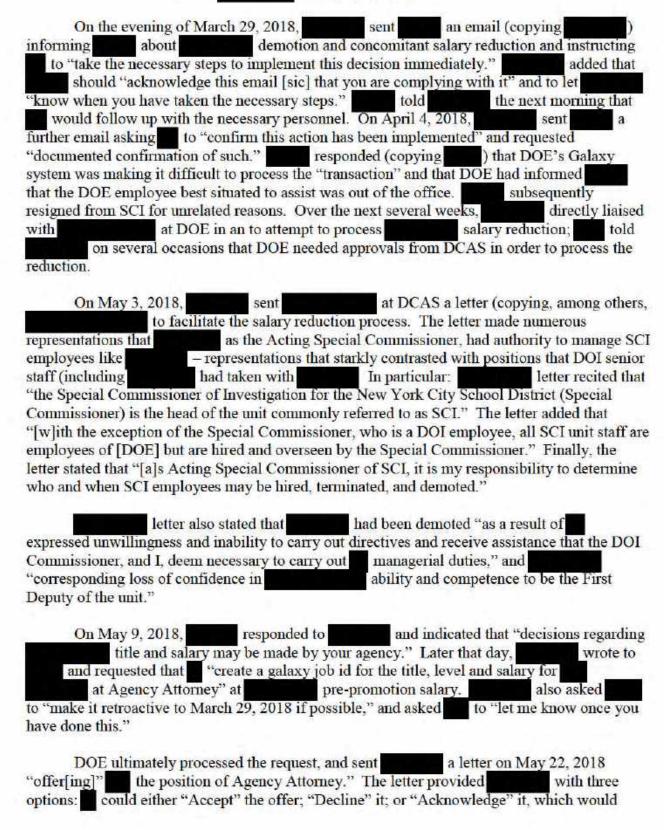
⁵⁹ https://www.nytimes.com/2018/03/30/nyregion/investigation-chief-special-commissioner.html

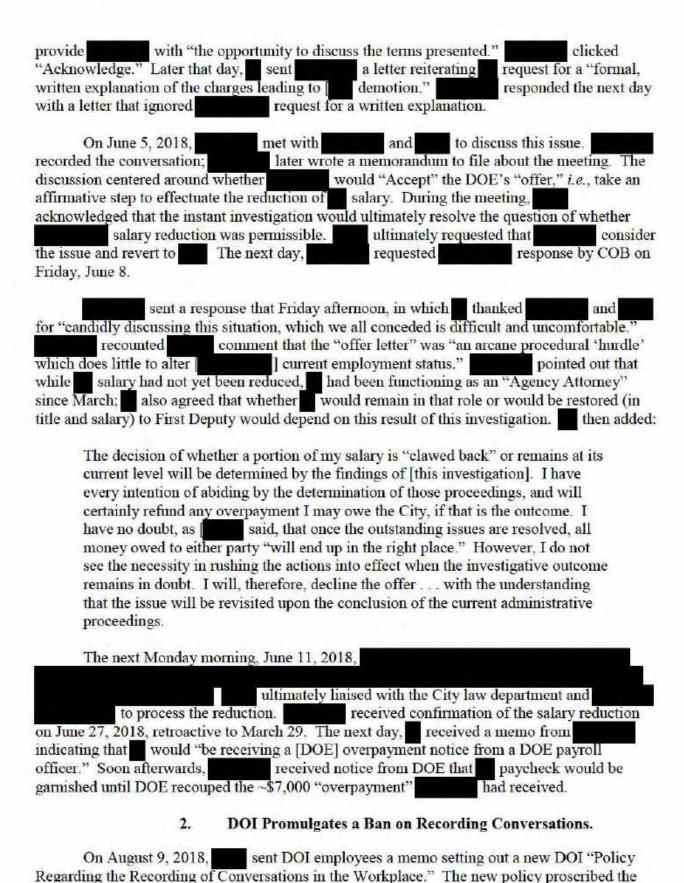
⁶⁰ https://www.nytimes.com/2018/04/02/nyregion/de-blasio-peters-schools-investigations.html

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. Salary Reduction





electronic or audio recording of workplace-related communications "without the consent of all

parties to such communications."	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 confid	entiality of sensitive information; and to protect personal
privacy." The new policy did not a	appear to restrict DOI senior staff's practice of documenting
its communications with	in written memoranda.

IV. ANALYSIS OF WHISTLEBLOWER CLAIMS

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:

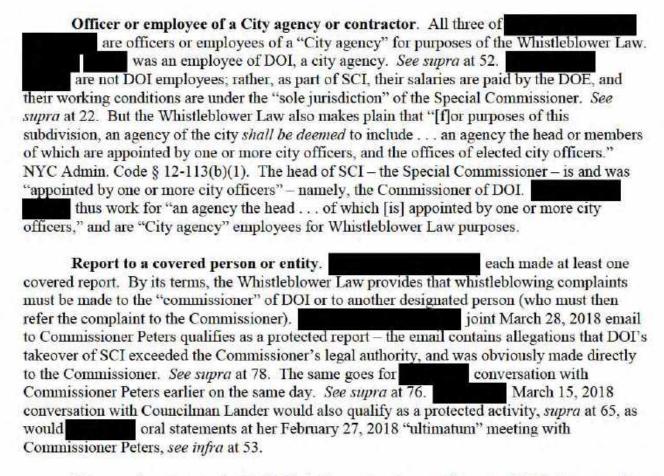
- 1. The complainant is an officer or employee of a City agency or contractor.
- The complainant made a report to one of the entities designated under the Whistleblower Law.
- The complainant suffered an adverse personnel action.
- The complaint involved, or the complainant had reason to believe it involved, corruption, criminal activity, conflict of interest, gross mismanagement or abuse of authority.
- 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 substantiated whistleblower claim, but has not.

A. Elements One Through Three

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



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.6

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 applaints made not just to Commissioner Peters personally, but to anyone on DOI's senior of DOI's own interpretation of the Whistleblower Law has long been that any complaint to a subset of DOI – not only reports to the Commissioner him or herself – is sufficient to trigger istleblower protections. Moreover, the First Department's Tipaldo opinion suggests that, in cumstances where the statutory recipient of a whistleblower complaint and the alleged ongdoer are one and the same, the requirements for lodging an effective report should be axed. As such, any assertions by about the unlawfulness of DOI's actions – luding conversation with on the morning of March 28 – should also qualify as steeted reports. Nevertheless, we need not address this issue further because lodged complaints directly with Commissioner Peters or another designated person. 63	
Adverse personnel action. Under the Whistleblower Law, an adverse personnel action ludes "dismissal, demotion, suspension, disciplinary action, negative performance evaluation, any action resulting in loss of other benefit." NYC Admin. Code § 12-113(a)(1). was terminated; was demoted from First Deputy to his prior counsel sition; both are clearly adverse personnel actions.	
ikewise, while we doubt that the "Objection Memorandum" sent to qualifies as a stleblowing report even in these unusual circumstances, we need not address the question. duly forwarded complaint to DOL as directed by the Whistleblower Law.	

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 satisfy both prongs of this test. That is, were correct that the conduct described in 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, reasonably believed that DOI's actions involved an abuse of authority at the time they made their whistleblowing complaints.

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.

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employee's official duties and City business. See also infra at n 103.

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

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. 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." 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."

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 The risk of being wrong in that scenario is quite apparent; pushing forward regardless was potentially an abuse of authority.

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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 wrongdomg" 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. The 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

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.

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We also credit testimony from 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 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. 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.

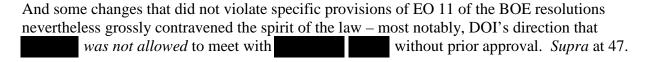
⁷² The 1990 resolution also confers upon the Special Commissioner additional policy-making and deliberative powers. *See* Penultimate RESOLVED (stating that "*the Deputy Commissioner*, in consultation with the Board and the Chancellor, *shall develop procedures* to ensure the effective and timely implementation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



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.

ODuring 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 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.

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

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, 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, 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). 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.

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 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." March 28 termination letter relied on both provisions for the proposition that Commissioner Peters was entitled to direct 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

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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. The 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.

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

Indeed, it is not clear that Commissioner Peters had legal authority to terminate 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 and so we do no 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.

The two cases cited in 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 on the very day that 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:

- 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.
- 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 SCL

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 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 "[1]anguage should not be considered superfluous." Id. The case law is admittedly sparse, and of limited probative value. "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

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

⁸⁰ See 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, May 3, 2018 letter to DCAS – in which proclaimed that the Special Commissioner (and not the DOI Commissioner or designees) possesses authority to hire, fire, and oversee SCI employees, see supra at 87– creates a strong inference that DOI's contrary representations in termination letter and during their interviews in this investigation were insincere. Of course, sent the letter to DCAS at a time when was the Acting Special Commissioner; mother 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 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,

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. , 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 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

Mayor David N. Dinkins to create the independent investigator's post.")

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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

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

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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.

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]."

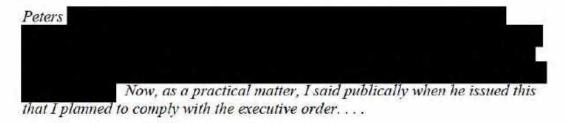
⁸⁶ Commissioner Peters testified that the drafters of EO 11 would have understood that the City Charter, and in particular Chapter 34's limits on the powers of the DOI's Commissioner's deputies, limited their ability to make SCI an independent office:

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 arguments about EO 11 had not been properly advanced:

What happened is I said to 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 said, in the first meeting, said "Okay." In the second meeting, said to me — "No, I won't comply. I won't take direction from I won't do the systemic cases. I won't you know, I will not agree to be supervised by I won't take direction." And got fired, not for telling me disagreed with my views of the law. 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:



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.

^{\$7} The record does not reflect that said any of those things in the "second meeting," or ever. See supra at

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

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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 as a "deputy"—he named the "Special Commissioner" and tried to treat as an "Inspector General." And Commissioner Peters intentionally did not accord the powers of a "deputy" of DOI. Rather, one of Commissioner Peters' first acts upon asserting control over SCI was to rescind 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 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.

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.

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.

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

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. testimony on this issue was particularly alarming: 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 grav 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? I assume so, but my understanding is that they don't. So whether those resolutions are still in effect is . . . I don't know the answer to it. Question: seems to think they are. Question: There, would be a really good authority, right? I guess would. I'm not saying 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: Okav. But we hadn't really drilled down on it that detail. Respectfully, this testimony evidences careless (at best) thinking. Yet testimony was that, , 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, learned from 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 oral comments extensively when they views (even though DOI had relied on to be taking a position that supported DOI). perceived 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 . 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 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. conclusions are consistent with our research on the matter. But the point is and DOI closed their collective eyes and attempted to wish the BOE research was done. 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. DOI Claim: Stancik and Autonomy Arose Out of a v. "Special" or "Informal Arrangement." During the interview process, various members of the DOI senior staff asserted that the and Stancik was part of an "informal understanding" between independence enjoyed by those men and DOI, and not required by the law. We found these observations unpersuasive. witnesses who testified to that effect lacked firsthand knowledge about any such "informal" arrangement. Those observations are also inconsistent with the record, which 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; testified that he regularly updated about major pending SCI investigations even though he had no legal obligation to do so. Commissioner Peters did not deny that view of EO 11 was one in which SCI was accorded substantial autonomy. However, Commissioner Peters testified that during a in the fall of 2017, conceded that Peters "had the legal authority" meeting with 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 for several reasons: (1) denied making it: (2) the comment, if made, was made on the eve of , and in the same conversation in which urged Commissioner Peters not to reorganize SCI; and (3) the comment is not consistent with 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

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.

incidents).

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; 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, and and 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 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 — 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 and was a general-purpose meeting to brief 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 as to the presence of any changes at SCI (or any legal issues surrounding those changes). And Commissioner Peters and never mentioned, for example, that they had reached out to DOE for a MOU. It and 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

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

91 Stated at one point during interview that "We met with the land and lead and lead that either or 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.

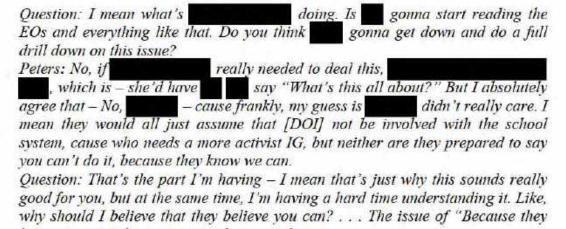
elided the fact that SCI was "known" in that manner only within the halls of DOI. The novelty of the "IG for DOE" branding and its inconsistency with the governing executive enactment was obviously relevant information; Commissioner Peters did not provide it.

- 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 had a very different reporting obligation to DOI than the one Commissioner Peters had imposed on 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, called and told 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 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 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 recollection about the substance of his January 26, 2018 conversation with - both in the moment, as reported to Commissioner Peters and others at DOI, and during interview with the undersigned - was not wholly accurate. In other words, we credit testimony that he did not offer the view that SCI employees were DOI employees or that DOI controlled SCI, and that conclusion because: (1) version is consistent with what told in February 2018, as documented by and with own notes; (2) notes show that 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 had affirmatively blessed DOI's control over SCI; (3) it is undisputed that March 12 call that the issue of who managed SCI was "between DOI and SCI," and so it is also likely (particularly notes) that had offered the same views in January; and (4) considering all of the relevant factors, including the respective incentives, testimony about the call was more credible than

objected to the proposed CISO line. That rather relevant fact did not make it into the email.
Third, we find the email exchange between Commissioner Peters and to cut strongly against the notion that DOI was "open and notorious" about its position. To recap, immediately after Commissioner Peters had a "harsh" and "brusque" meeting with regarding obligation to follow DOI's imposed reporting structure, Commissioner Peters drafted a proposed email to and copying that would have invited them to weigh in on whether changes to EO 11 were required.
Supra at 57. The email was never sent. Instead, two days later, Commissioner Peters wrote an internal memo to file about the meeting with and
Commissioner Peters explained this episode as follows:
Peters: There's a big difference between — I don't believe that either 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.
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.



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.

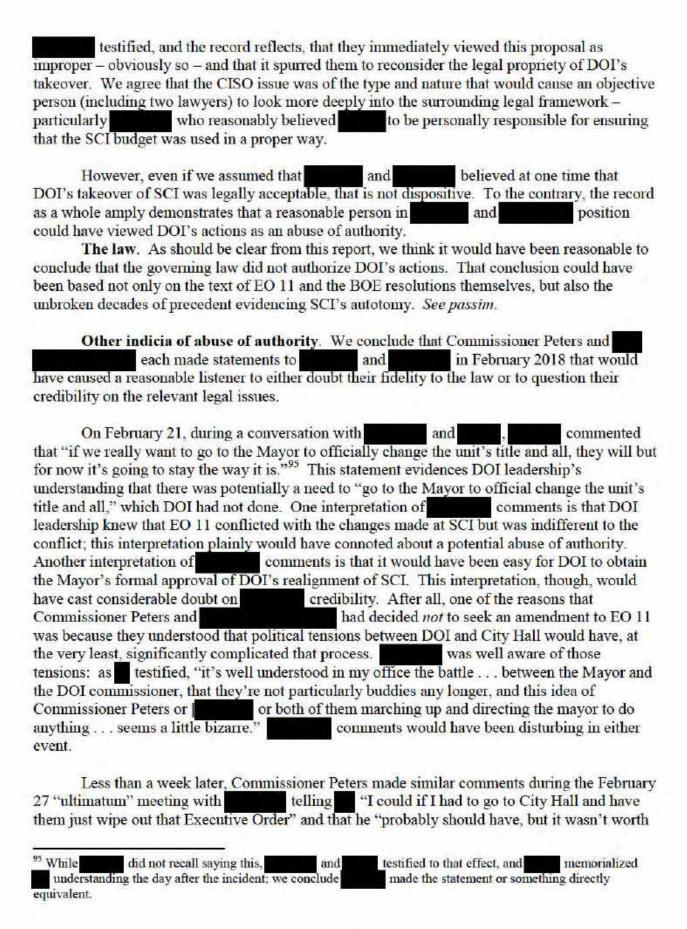
with the potential need for legal amendments.

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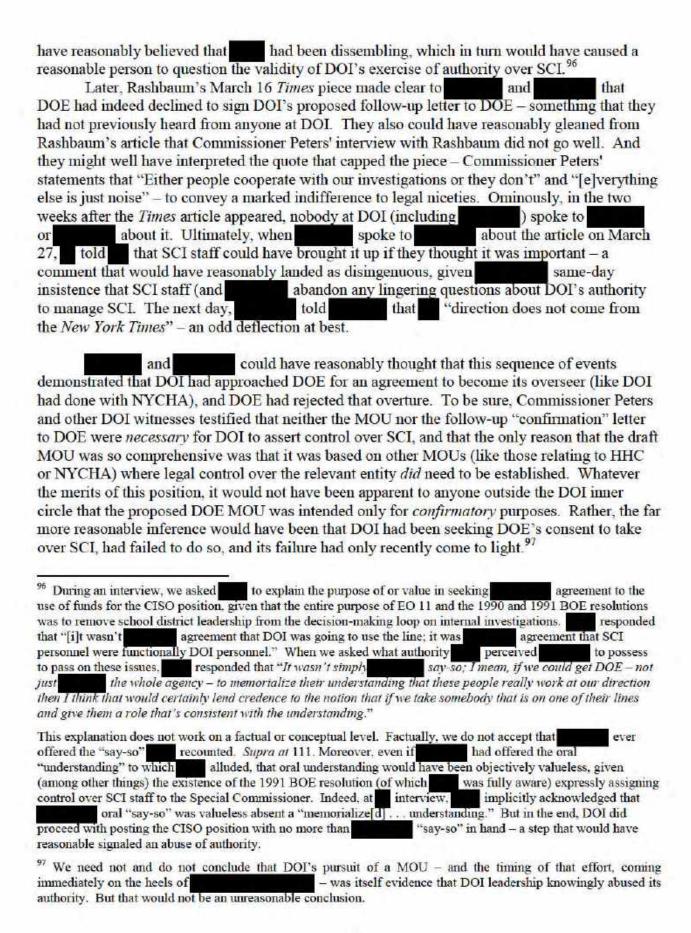
For one thing, EO 11 did not require the DOI Commissioner "to appoint a Special *Deputy* Commissioner" (emphasis added) as Commissioner Peters stated, much less any obligation to appoint anyone "to serve as the IG for DOE." For another, Commissioner Peters' statement that he did not believe that there 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 had been "known" as the "Special Commissioner" for decades. Moreover, the "common labeling" of the position had very little, if anything, to do

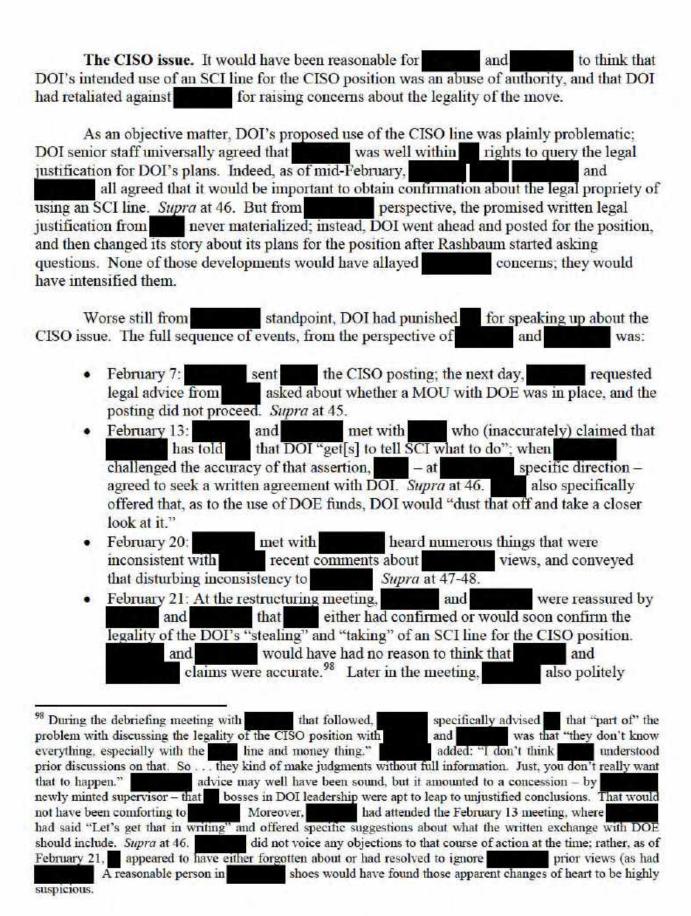
C. Reasonably Believed That DOI's Actions Constituted an Abuse of Authority.

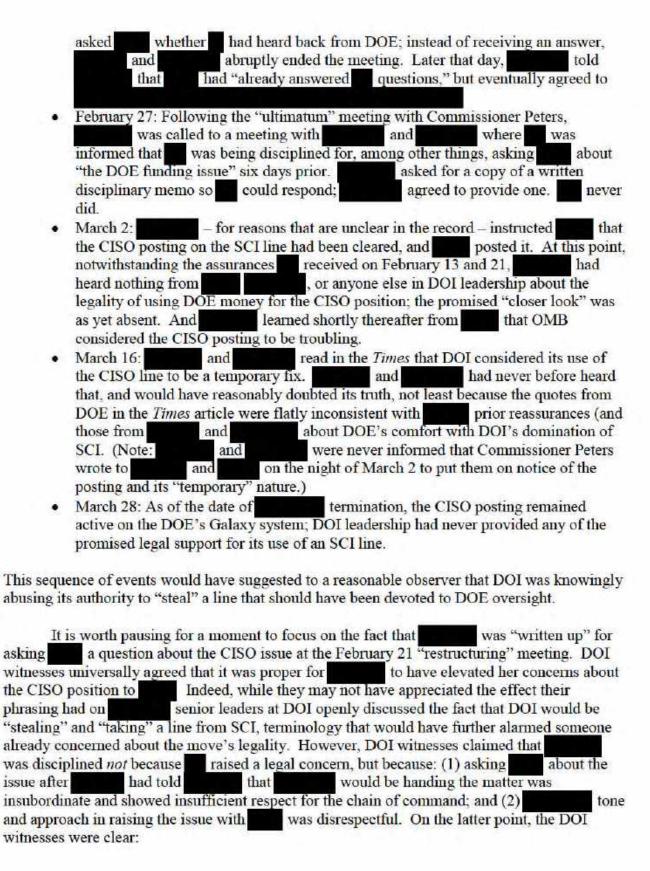
Even if DOI's takeover of SCI was not actually an "abuse of authority," the record demonstrates that and are reasonably believed it to be so.
At the outset, the record contains some evidence that cuts against the reasonableness of and belief: specifically, the "notice" they received during their interviews for their respective positions. As described above, Commissioner Peters, and others testified that was put fully on notice during multiple job interviews that DOI intended to treat SCI like an IG's office. The same goes for who was apparently eager to combine SCI with DOI at the time interviewed for the things, memorialized that explained his "desire to fold SCI into DOI and the many advantages – and challenges – in doing so." Supra at 34.
Both and 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 and were put "on notice" of DOI's intentions by December 2017 is unimportant for several reasons. As with and the City Council, we do not expect that and 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 or 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 and developing that belief between January and March of 2018.
Another factor supporting the reasonableness of that position is 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? A number of sources. I mean, I think —I do recall 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, is working it out with Question: Did ever discuss with you the purpose of the MOU as it related to the legal framework? No. It was just — it was sort of understood. It's going to be — there will be an MOU.
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 and was DOI's February 7, 2018 indication that it planned to take a SCI line for the CISO position. Both

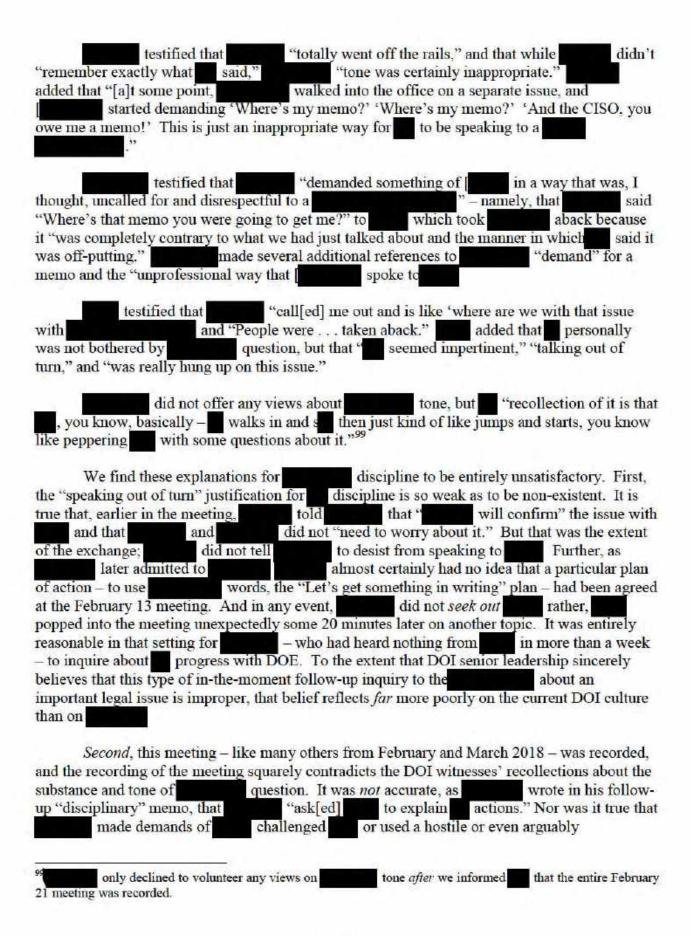


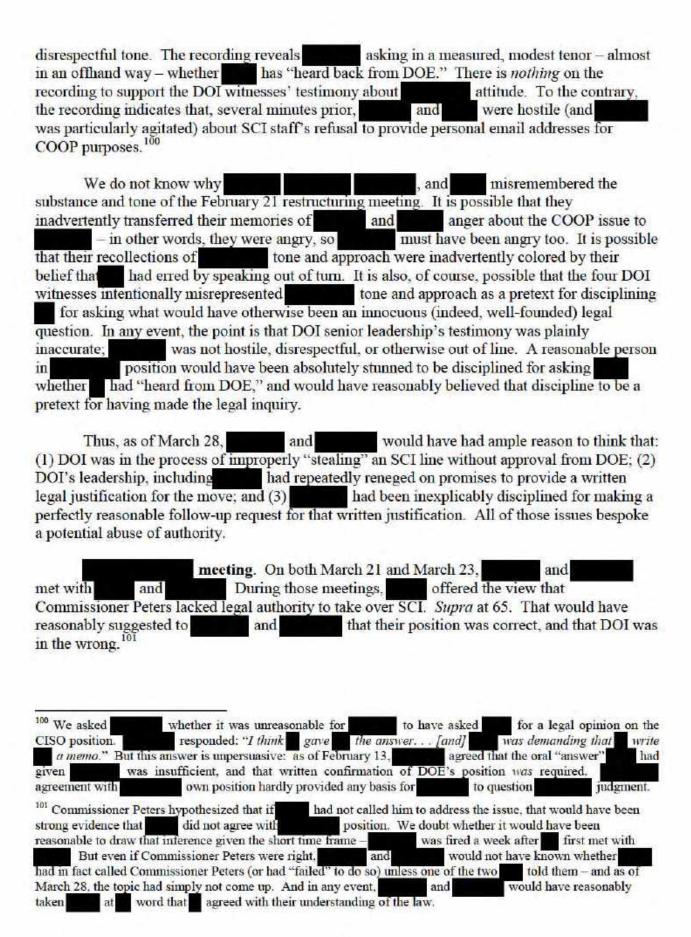
my time, effort, and energy." A moment later, Commissioner Peters told was was "also the Special Commissioner of Investigations for the school district because there is still an
executive order that I haven't bothered to have eliminated that says I have to appoint one."
These statements were objectively troubling. For one thing, 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 that he "probably should have" sought and obtained a change in the law, but did not
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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 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.
have considered those comments to be akin to an assertion that Commissioner Peters was above
the law. As for both and testified that appeared irritated
throughout the February 21 discussion about title and role, and that tone
was caustic. also made other comments during the same interaction that bespoke of an
indifference to the law – namely, that "needs to stop worrying about title and start
making arrests."
Taken together, and and 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 and and 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, and others at SCI were in contact
with was generally aware that a MOU with DOE was in the works, as was
but the fact that nobody at DOI had updated or about the status of
negotiations with DOE as of February 2018 was itself a red flag. Then, on February 20, 2018,
learned directly from that DOE had not signed the proposed MOU and
would not sign it as drafted. 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, and had been told by on February 13, 2018 that
believed that DOI controlled SCI: or as put it, that had said that DOI "get[s] to
tell SCI what to do." After heard otherwise from would











We need go no further; for all these reasons, and and 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 and Id. § 75-b(2)(a).

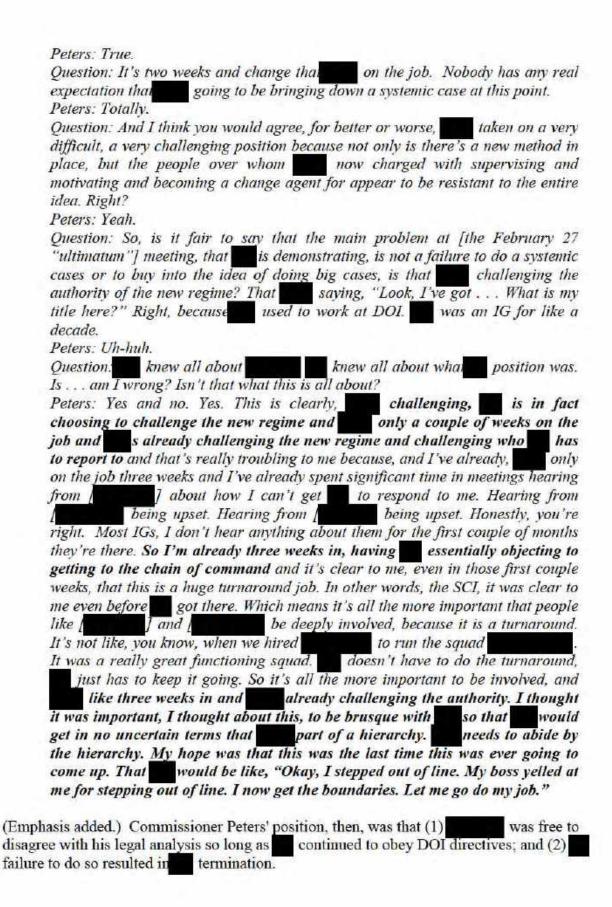
Even under the strictest causation standards, an employer's claim that an employee was "insubordinate" will not defeat a claim of retaliation when the insubordination directly relates to the alleged whistleblowing conduct. *See Zielonka v. Town of Sardinia*, 120 A.D.3d 925, 927 (4th Dep't 2014) (in case 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

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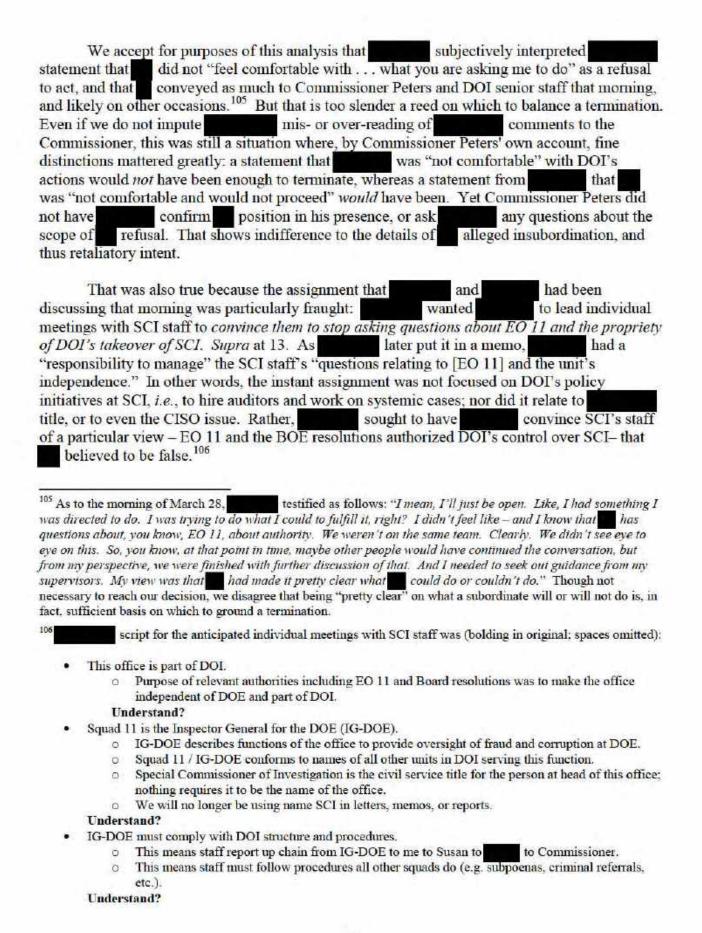
¹⁰² In the First Amendment and state constitutional context, a public employer can assert a defense arising out of the U.S. Supreme Court's decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968) – namely, that "a government employer may take an adverse employment action against a public employee 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.

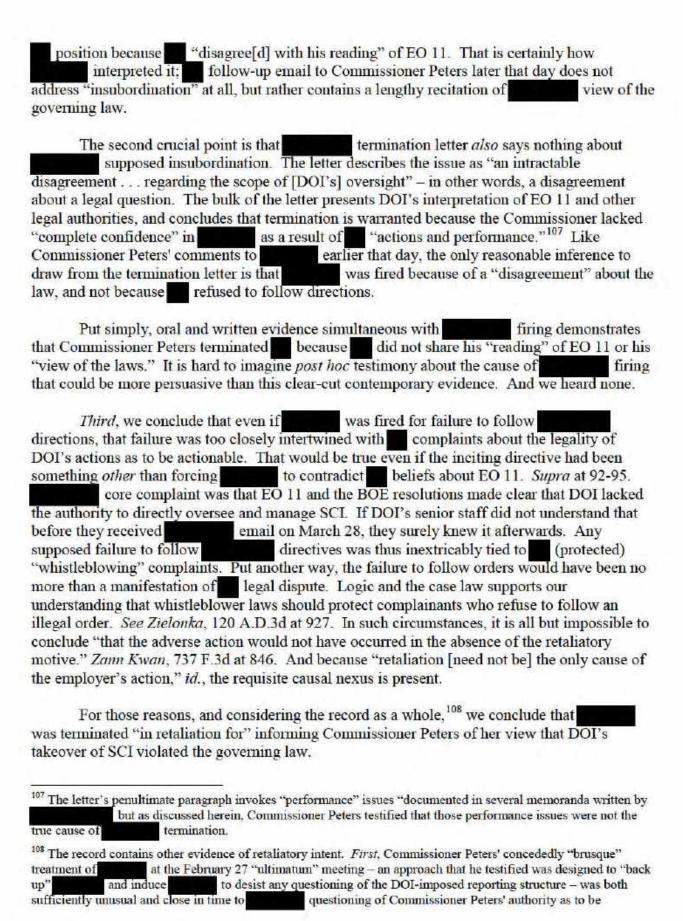
Applying the above-described principles, the record demonstrates a causal link between and complaints of wrongdoing at DOI and the adverse employment at they respectively suffered.	
1.	
The analysis for is relatively straightforward. Commissioner Peters made decision to terminate he agreed that, as of February 5, 2018 (first day was confident that he he highly qualified candidate who had sailed through the interprocess, see supra at 32— was the right person for the job. 103 As a result, the fact that was fired less than two months later, and nearly immediately after having engaged in a protection complaint, would ordinarily create a strong inference of retaliatory intent. See, e.g., Summer Hofstra Univ., 708 F.3d 115, 128 (2d Cir. 2013) ("This Court has recently held that even gas four months can support a finding of causation").	y), he view ected
Commissioner Peters testified that was fired for a single reason was unwilling to follow instructions, and thus had shown unwilling to follow direction from Commissioner Peters through the chain of command he had established. Secsupra at 107. He expressly disavowed reliance on other factors; for example, Commissioner Peters testified that the "disciplinary" issues captured in memoranda played no in his decision to terminate with Nor did Commissioner Peters share the broader journal performance concerns expressed by other DOI witnesses, such as supposed reluctance to take on "big, systemic investigations." Indeed, Commissioner Peters acknowledged that alleged refusal to follow directions from and was at the very least intertwined with expressed concerns about the legality of DOI's neighbor orders:	e er role b-
Question: 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."). 103 104 105 106 107 108 109 109 109 109 109 109 109	
As a result, we need not analyze alleged "performance issues" in any detail. In particular, we not consider whether: (1) any conclusion that suffered from termination-worthy performance failing during her 51 days at SCI would have been justified in light of, <i>inter alia</i> , DOI senior staff's acknowledgment	s t of the mony



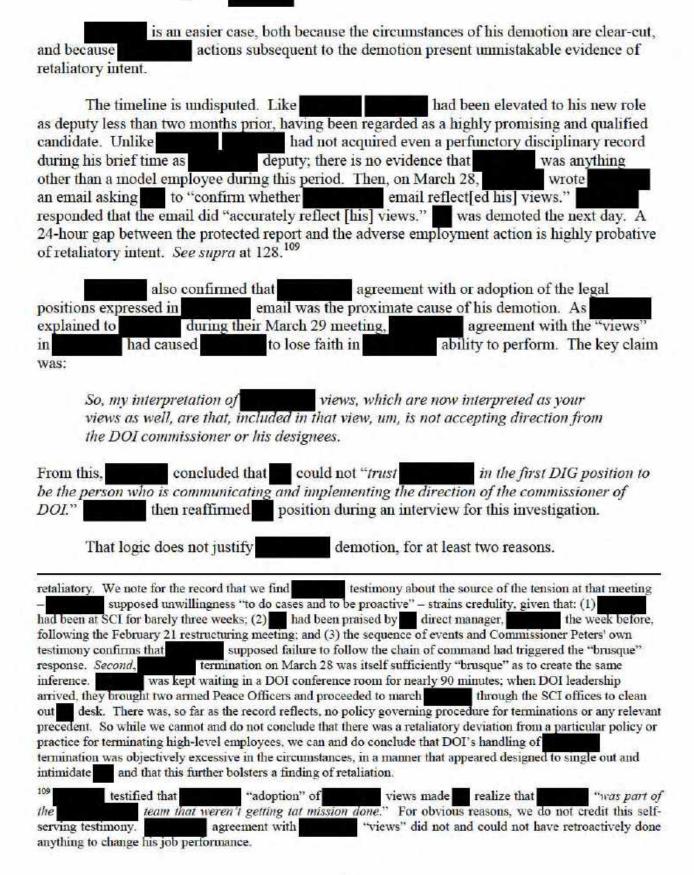
We must consider whether there are "weaknesses, implausibilities, inconsistencies, or contradictions in [DOI's] proffered legitimate, nonretaliatory reason[] for its action." Zann Kwan, 737 F.3d at 846. There are. We conclude that was terminated at least in part because had made a complaint to the Commissioner about the scope of DOI's authority, and not because of 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.
had actually been "insubordinate." It is clear from the record that Commissioner Peters himself never heard refuse to follow any directives from 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 and right, that I had back and also make it clear to this IG, whatever you want to call that I wanted to stop giving my AC a hard time and to do job." "Giving someone a hard time" is not the same thing as insubordination. And around this time, was telling to face that thought that and were "doing a really great job in a very challenging situation," and that did not "want to see little things like the [COOP] email discussion, like, sidetrack people's views of how well everything actually is going." 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:
 met with graph of the morning and told graph in effect, that believed that EO 11 barred DOI's actions. The recording of the conversation reveals that graph of the furthest graph 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 graph out of frustration – ended the conversation within minutes. then met with Peters; again, the recording confirms that neither
nor Commissioner Peters said anything about failing to follow 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, and sent their "whistleblower" email. The email said nothing about any unwillingness on or part to follow orders from DOI senior staff. (That was no doubt intentional.)
In other words, at the time Commissioner Peters terminated simply had not committed the supposedly fireable act – refusing to take direction from any concrete way.

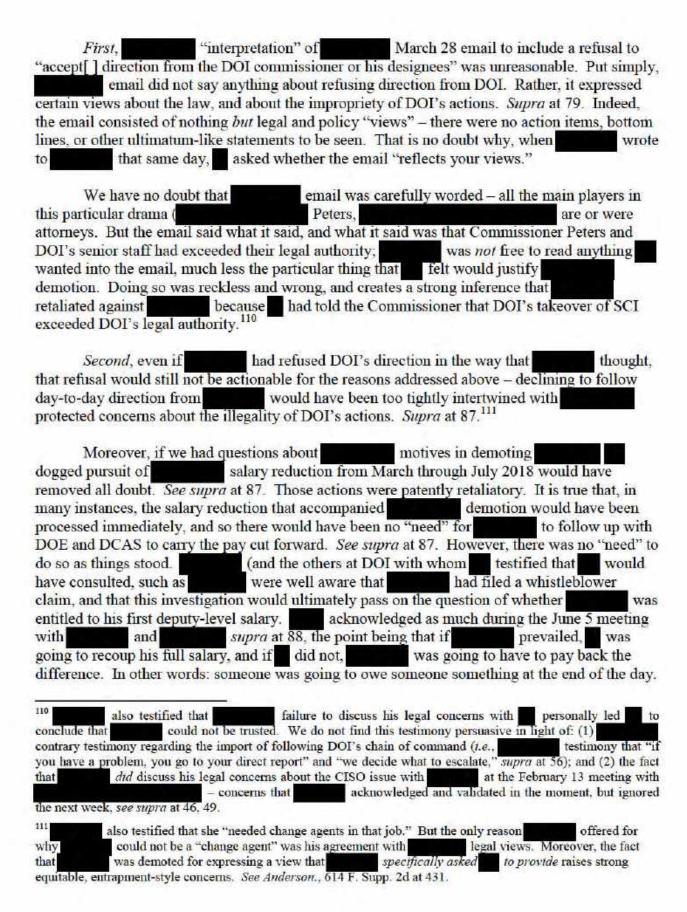


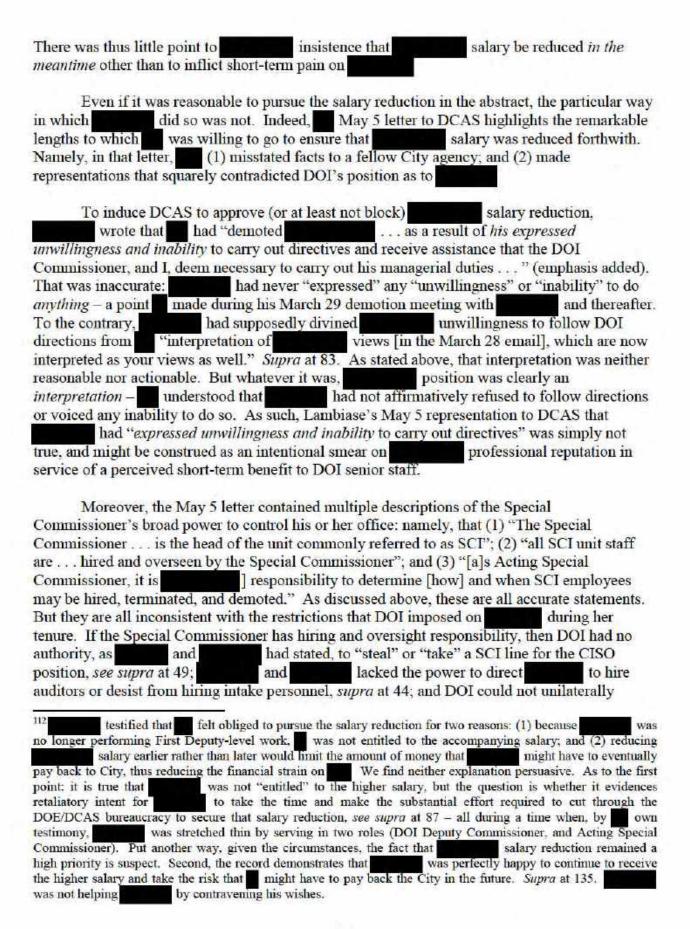
Whether failure to follow a directive to contradict one's own sincerely held legal interpretation could justify an adverse personnel action appears to be an issue of first impression; we could find no precedent on the question. Our view is that insistence that take the lead on quashing SCI staff's questions relating to EO 11 was itself a retaliatory act. In knew that the legal insistence that herself had serious questions about the legality of DOI's actions, see supra at 69, and yet that instructed to on March 26 that "It's not your job or 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." In appeared to conclude that one way to avoid "hear[ing] EO 11 this, EO 16 that" in the future was to force to take a different line in front of the 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 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 was in fact "insubordinate," substantial direct and indirect evidence shows that was fired because of 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 on March 28, he explicitly said that had to leave SCI because of 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 failings as "insubordination" or "failure to follow directions." Rather, because view of the laws and requirements [is] different from mine. This is not ambiguous; it is a clear statement from Commissioner Peters that 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?



2.







impose DOI's employment and investigative policies on SCI staff, *supra* at 19, even if those policies were objectively superior to SCI's.

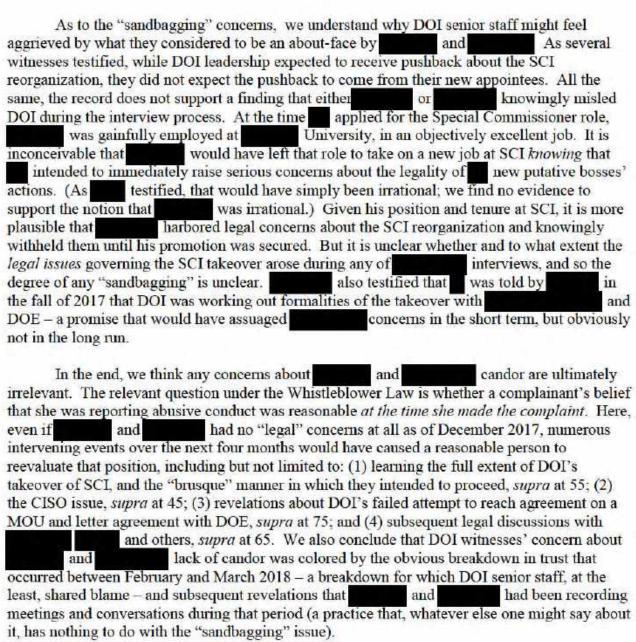
The gap between	views about own auth	
Commissioner and	powers cannot be fairly bridged.	
	ter, to contradict any of DOI's prio	
	speak for themselves. Under the la	
	"oversee" his or her own staff as he	
	capacity as a DOI Deputy Con	
	e undersigned) otherwise. Both car to accurately portray the scope of the	
		for agreeing with that precise
understanding of the law.	seeking to further punish	for agreeing with that precise
understanding of the law.		
For the foregoing rea	asons, we conclude that	demotion was "in retaliation for"
the assertions and	made via email on March 28, an	the same of the control of the same of
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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 demotion was "in retaliation for" March 2018 whistleblowing report to Councilperson Lander. The record does show that, after the March 26 City Council hearing, Commissioner Peters immediately suspected that had been the person "at SCI" in contact with communicated his suspicions to Supra at 68. And in many circumstances, and demotion on March 29 - three days later - would be strong circumstantial evidence of causation. Here, however, the significant events of March 28 - i.e., request that affirm his agreement with explicit reliance on that affirmation – were an intervening cause that swamped the import "views" and dealings with Lander. That said, if we had any doubts about the sufficiency of the evidence of the Lander exchange would cut meaningfully in supporting causation as to

"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 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, 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, 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 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 and adverse 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 and DOI over these same issues. We will not provide 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 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 and concerns related to process and authority, and not to substance; we are confident that 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. 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
- The costs of the above reversal should be borne by DOI.
- e. As soon as is practicable following reinstatement, Commissioner Peters, Special Commissioner First Deputy and 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

	int Status Meeting Det	WEER DOL WHILL DEL	
f.	A meeting should be se		
	reinstatement. The me	eting should be atten	ided by at least: (1) Commissioner
	Peters,		and
	and any oth	er appropriate DOI e	mployees; and (2) Special
	Commissioner	First Deputy	and any other appropriate
	SCI employees. Prior	to the meeting, Com	missioner Peters and Special
	Commissioner	should meet and co	onfer regarding whether any other
	individuals - such as		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 publicfacing 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.
 - 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.
- 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 rec	commend that Commissioner Peters	š
issue	a self-admon	ishment for attempting to mislead	and intimidate during the	
Febru	uary 27 "ultin	natum" meeting. Our focus is not o	on the commissioner's initial	
direc	tion that	should not sit (although we fir	nd that unwarranted and distasteful	1).
or otl	her aspects of	the meeting (like excl	usion) that suggest an intent to	
isolat	te	Rather, our focus is on the following	ng 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

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 and order it to be placed in his personnel file (with a copy to

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 claim under the Whistleblower Law fails, but that 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,

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