
In the Matter of an Investigation into
Governor Paterson's Acquisition of
World Series Tickets

Respondent

Alleged Violations of Sections 73(5) and 74(3)(d), (f) and (h)
Of the Public Officers Law

A Notice of Reasonable Cause was issued in this matter on March 3, 2010 and a hearing was held on August 17, 2010. Respondent did not appear at the hearing and had not previously sought an adjournment of the matter. Instead, late in the afternoon of the day preceding the hearing, Respondent's counsel sent a letter to the Commission on Public Integrity ("Commission") stating that Respondent would not participate in the hearing. The letter was given to the Commission's Associate Counsel who was handling the matter and she, as requested in that letter, informed the hearing officer of the Respondent's intentions (Exhibit 35, Hearing Officer's 1).

At the hearing, which was conducted on the following day, neither Respondent nor his counsel appeared and evidence was introduced that established that Respondent and his counsel had been properly served with written notice of the hearing (Exhibits 35, 36, 37, 38; transcript pp. 11-14). Accordingly, a default hearing was held pursuant to 19 NYCRR Part 941.12. The record from that August 17, 2010 proceeding consists of the testimony of six witnesses called by the Commission and twenty-seven exhibits including, pursuant to CPLR 3117 (a)(2), the transcript of a sworn interview of Respondent Governor David A. Paterson conducted by Commission staff on February 24, 2010.

Respondent is charged with alleged violations of Public Officers Law sections 73(5)(a) and (b) and 74(3)(d), (f) and (h) arising from circumstances surrounding the solicitation, acceptance and use of five complimentary tickets (for Respondent, his teenage son, his son's teenage friend and two of Respondent's aides) to Game 1 of the 2009 World Series from the New York Yankees ("Yankees"), a registered lobbyist, as well as the possible use and attempted use of his official position to secure unwarranted privileges for himself and others (Exhibit 39).

FINDINGS OF FACT

1. On October 28, 2009 Governor David A. Paterson ("Governor") attended Game 1 of the 2009 World Series at Yankee Stadium with a senior aide, David Johnson; the Deputy Director of State Operations, Mark Leinung; the Governor's teenage son and his son's friend. (Transcript, Trost, p.20).
2. Lon Trost, General Counsel and Chief Operating Officer for the Yankees, testified that the team has a policy for elected officials that states that all tickets must be paid for or the official must provide a letter from his legal counsel reflecting the fact that the official will be attending the game in his official capacity on official government business and therefore need not pay for the tickets. He went on to state

that there is no deviation from this policy as it is the safest way to insure compliance with the statutes of New York State (Transcript, Trost, pp.18-19).

3. Mr. Trost testified that he knew the Governor had attended Game 1 of the 2009 World Series and that Governor had not been invited to that game by the Yankees (Transcript, Trost, p.19-20).

4. Indeed, Mr. Trost became aware that the Governor intended to attend Game 1 on October 27, 2009 – the day before Game 1- when he received a telephone call from Matthew Nelson, Director of Scheduling for Governor Paterson, who stated that the Governor planned to attend the game. Mr. Trost asked how many tickets were needed and was informed 5 or 6, although he could not remember the exact number. He also asked if security was included and noted that he would pass the information on to Brian Smith, Yankees Vice-President for Community and Corporate Affairs (Transcript, Trost, pp. 20-21).

5. He went on to state that he understood that the Governor received five tickets to Game 1 and that he complied with the protocol for such tickets (Transcript, Trost, p. 21).

6. The Mayor of New York, the former Mayor, the First Lady of the United States, Michelle Obama, and the Second Lady, Dr. Jill Biden, also were in attendance at Game 1 (Transcript, Trost, p. 23).

7. Michelle Obama and Jill Biden performed ceremonial functions at Game 1 in that they had spent some time earlier in the day at Veteran's Hospital in the Bronx and they attended Game 1 in order to accompany Yogi Berra out to the field to deliver the ball used in the first pitch to an injured veteran who had returned home from Iraq, Tony Odierno (Transcript, Trost, p. 23).

8. Governor Paterson did not perform any specific ceremonial function at Game 1, nor was his presence publically announced, although in his testimony to the Commission he stated that as his official business "as Governor is to represent the State at events that have state-wide interest" and "[T]his was the first game of the World Series. It's always a national event, like the Academy Awards or, you know, Governor's State address or something like that. And as part of my duty I saw that I believed that I should be there to represent the State. And I still do." (Transcript, Trost, P. 23; Exhibit 40-Transcript of examination under oath of Governor David A. Paterson, p.3).

9. Brian Smith, Senior Vice-President of Corporate and Community Affairs for the Yankees, then testified that part of his job is to oversee efforts related to neighbors and community partners to make a difference in the surrounding communities and to manage some aspects of "ownership ticketing" which he described as visiting club members, the limited partners when they want to see a game and related ticketing (Transcript, Smith, pp.25-26).

10. A day or two before Game 1 Mr. Smith learned from Mr. Trost that Governor Paterson was interested in attending Game 1 and Mr. Smith instructed his assistant, Dana Carabello, to confirm that a request for tickets for the Governor had been made. His office subsequently had a conversation with David Johnson, Senior Aide to the Governor, where the request was confirmed, payment was requested and Mr. Smith's office was informed that payment was not required because the Governor was attending on official business (Transcript, Smith, pp. 27-28).

11. Subsequent to that conversation, Mr. Smith's office received a letter, from the Governor's Counsel, Peter Kiernan, via an e-mail dated October 28, 2009 at 3:34 p.m., stating that the Governor would be

attending the opening game of the World Series on official business (Transcript, Smith, pp. 28, 29; Exhibits 4 and 28).

12. Upon receipt of the letter, the ticket office was contacted and told to release the tickets for the Governor, and that no payment was expected pursuant to the Kiernan letter (Transcript, Smith, pp. 29-30).

13. Mr. Smith testified that the Governor previously had attended the 2009 season's opening day game and he was aware of that fact because he had received a similar letter from Peter Kiernan via email on April 15, 2009 at 6:43 p.m. (Transcript, Smith, p. 30; Exhibit 1).

14. Irfan Kirimca, Senior Director of Ticket Operations for the Yankees, testified that at the time the Governor received five tickets to Game 1 approximately 140 tickets to that game were available to the general public with a limit of two per person per round and only through Yankees.com (Transcript, Kirimca, pp.33-34).

15. Mr. Kirimca was told to allocate the Governor's tickets and to issue the receipt but he did not expect to receive any payment because he was told the Governor was attending the game in his official capacity; the face value of the Governor's tickets was \$425 per ticket (Transcript, Kirimca, p.35).

16. Mr. Kirimca testified that on the day after Game 1 he received a telephone call from the Governor's office from someone who identified himself as David Johnson who informed Mr. Kirimca that the Governor wanted to send a check to pay for the tickets that were used for Game 1 and that he subsequently received a check for \$850 with a cover letter stating that the check was to pay for the two tickets used by the Governor's son and his friend (Transcript, Kirimca, pp.35-37; Exhibit 3).

17. Mr. Kirimca subsequently, and unexpectedly because- as he testified- he was not expecting payment for the tickets, received two checks, each for \$425, one from David Johnson, which was dated October 30, 2009 although it was postmarked November 7, 2009, and one from Mark Leinung, dated November 1, 2009 (Transcript, Kirimca, pp.38-40; Exhibits 9,10,17).

18. Peter Kauffmann, former Director of Communications for Governor Paterson, testified that he oversaw day-to-day media interactions, supervised the communications staff of approximately 20 and provided counsel to the Governor, and that in that role he was familiar with general ethics rules and the acceptance of gifts and benefits and that he had a big binder, "a manual" on the topic (Transcript, Kauffmann, pp.40-42).

19. He explained that his general understanding of those rules was that no gift of more than nominal value could be accepted, which he believed had been defined as about the cost of a cup of coffee and that he was unaware- prior to Game 1- of the policy in the Governor's office in the Executive Chamber with respect to attendance at sporting events and when it was necessary under ethics rules to pay for tickets but that he became aware that there was language that if an event was widely attended, a ceremonial occasion of great importance to the State, and if the Governor was attending in his official capacity such events were exempt from the gift ban (Transcript, Kauffmann, pp. 42-43).

20. The morning after Game 1, Mr. Kauffmann received an inquiry from Fred Dicker of the *New York Post* seeking information about the Governor's attendance at the game via an email sent at 9:52 a.m. on October 29, 2009, to which he drafted, but did not send, a response in which he stated that the

Governor had been invited to attend Game 1 by the Yankees as part of a ceremonial occasion attended by the First Lady, Michelle Obama. (Transcript, Kauffmann, pp.44-46; Exhibit 6).

21. He planned to send that response at a later time, after he had researched the Governor's attendance at the game but in this attempt to obtain information to answer the question originally raised by Mr. Dicker, Mr. Kauffmann testified that the "story shifted throughout the two days or so that I had been trying to answer Fred's initial question" and Mr. Dicker's November 2, 2009 article in the *New York Post* mentioned each permutation. (Transcript, Kauffmann, pp.47-48; Exhibit 5).

22. During that period of attempting to gather information, Mr. Kauffmann sent an email to Larry Schwartz, the Governor's Chief of Staff and Peter Kiernan, the Governor's Counsel, informing them that Mr. Dicker was looking for information about the Game 1 tickets in which he stated "I am sure he paid for the seats, so we're all good???" and to which he did not receive a reply. It was also during this period that he was informed "that for a widely attended event of great importance to the State, the Governor, in his official capacity, could attend without having to pay for tickets. And Counsel's office provided me with some language to that effect, which I tried to work into the statement that I gave to Fred." (Transcript, Kauffmann, pp.49-53; Exhibit 34).

23. Also, in other attempts to collect information so as to respond to Mr. Dicker, Mr. Kaufmann spoke to a number of people including David Johnson, to whom he spoke after he sent an email asking for information about the tickets, and Mr. Johnson was very "forceful and adamant" that the Governor did not have to pay for the tickets because the Governor's office had a letter from Mr. Kiernan, the Counsel, stating that the "Governor was there in his official capacity and the tickets don't have to be paid for." (Transcript, Kauffmann, pp. 51,53-54; Exhibit 29).

24. In addition, he spoke to the Governor by phone on the morning after Game 1-October 29, 2009- shortly after he received the request for information from Mr. Dicker; he asked the Governor where the tickets came from and who went with him and the Governor let him know that Randy Levine from the Yankees had invited him because they knew each other from law school. (Transcript, Kauffmann, p.52).

25. In his testimony to the Commission, the Governor stated that he made the decision to attend Game 1 probably the day before the game, as originally a special session of the Legislature was scheduled which would have required his presence in Albany. Once that session was postponed, he decided to attend the game because "I had been on CNBC, and they had me on with the president of the Yankees, and he said something in the interview like 'I look forward to seeing you' and he also had seen the Yankees' president "at an event sponsored by the New York City Partnership and he asked me 'are you coming?'" In addition, "I had done a number of interviews on sports radio, and they asked me if I was attending the game. And I answered yes, even though I hadn't started the process of going there. And then I had a bet with the Governor of Pennsylvania about the outcome of the World Series, and that was written about in the media. So I think that laid the foundation that as the head of the State that I should be there, and I saw that as official business. And I can't say that I can think of any more documentation that there would be official business than that."(Exhibit 40, pp. 8-9)

26. The Governor testified that his "understanding was that to give you tickets that the Yankees needed a letter stating that it was official business" and that he "asked David Johnson to get tickets to Game 1 and to speak to Peter Kiernan, our Counsel, about making sure it was done the right way." He also stated that "I told him that in addition to my ticket I would purchase two tickets for my son and a friend of his" and he later asked Mr. Johnson if another assistant who was a big Yankees fan, Mark Leinung,

would be available to go to the game. Finally, while the Governor did not determine if Mr. Johnson also should attend the game, he did attend and the Governor testified that he assumed that was because Mr. Johnson was scheduled to be the travel person that week. "In other words, each week a different staff member travels with me, and that was his week." (Exhibit 40, pp. 10-11).

27. The Governor stated that he did not know how the tickets were obtained, that he had no conversation with either Mr. Johnson or Mr. Leinung prior to Game 1 regarding payment for their tickets, although with respect to Mr. Johnson the Governor testified that "When the newspaper article came out, I asked, and he said he was paying for his ticket." However, he had no subsequent conversation with Mr. Leinung "[B]ecause I had instructed David Johnson to speak to Peter Kiernan and work this out. It was not clear to me. The State Police, I assumed wouldn't be paying. The media person, I guessed, would not be paying. It's not always clear what happens to the body person—in other words the person who is traveling. So I knew Mark Leinung had to pay [B]ecause he was not the travel person but another staff member to help with interviews and that kind of thing because he knows a lot about the subject." (Exhibit 40, pp. 12-13).

28. Mr. Kauffman, who at this time was unaware of these opinions held by the Governor, held other conversations with Counsel's office, David Johnson and the Governor during which Mr. Kauffman was told about the widely attended event of great importance to the State and how the Governor, in his official capacity could attend without paying for the tickets and Counsel's office provided Mr. Kauffman with some language to that effect which "I tried to work into the statement"-the response he initially drafted (Exhibit 6)- and into the one that he ultimately gave to Mr. Dicker in which he stated the Governor was invited by the Yankees in his official capacity to represent the State at a ceremonial occasion. (Transcript, Kauffman, pp. 53-56).

29. During the course of these several conversations Mr. Kauffman was under the impression that the tickets had not been paid for and were not going to be paid for; indeed he sent an email to one of the attendees at the game - Mark Leinung - in which he gave him a heads up about Mr. Dicker's inquiry and indicated that the response was going to be that no one paid for their tickets because everyone was a guest of the Yankees. (Transcript, Kauffman, p.55-57; Exhibit 8).

30. Also during these conversations, Mr. Kauffman offered his opinion that irrespective of any legal argument that could be made, the best course of action was simply to pay for all the tickets because "It would end it as an issue. It would be a one-day story." (Transcript, Kauffman, p.57-58).

31. However, Mr. Kauffman was informed by Mr. Johnson and the Governor that "no, no, no, that's not how this works. Rudy Giuliani went to Yankees' games for eight years as Mayor. This is the way it works. And a widely attended event of ceremonial importance, special occasions for the State, in official capacity you don't have to pay." (Transcript, Kauffman, pp.57-58).

32. Finally, on October 29, 2009, Mr. Kauffman sent a draft reply to Mr. Johnson and noted as background in that 1:11 p.m. email: that Michelle Obama and Jill Biden attended; that clearly this was an event with ceremonial significance; and, that no one had paid for the tickets and he asked Mr. Johnson to run that draft by the Governor and, at 1:33 p.m., Mr. Kauffman responded to Mr. Dicker's inquiry from 9:52 a.m. and stated the Governor was invited by the Yankees in his official capacity to represent the State on a ceremonial occasion. (Transcript, Kauffman, p.58-59; Exhibits 7 and 26).

33. Sometime thereafter Mr. Kauffmann had a conversation with Mr. Leinung to inform him that the story of the tickets was about to be made public and to advise him to pay for his ticket and Mr. Leinung asked where he should send the check; in an email sent at 2:14 p.m. on October 29 Mr. Kauffmann informed Mr. Dicker that Mr. Leinung paid for his ticket and in a later email at 5:35 p.m. to Mr. Leinung he stated that "I just told Fred Dicker (after verifying with the Gov) that you are paying for your ticket and always intended to pay for your ticket. DJ will have the contact info for you to send a check for the face value, \$425."(Transcript, Kauffmann, p.60-62; Exhibits 31, 33).

34. Later on October 29 Mr. Kauffmann had a conversation with David Johnson and the Governor in which they discussed that Mr. Leinung was going to pay for his ticket and the Governor stated that he would pay for his son and his son's friend's tickets, that he and Mr. Johnson would still be covered by the stipulation of the widely attended ceremonial event which they attended in their official capacity and that he always intended to pay for the two teenagers' tickets, although it was Mr. Kauffmann's understanding that none of the tickets had yet been paid for. (Transcript, Kauffmann, pp.63-64).

35. From this point on, Thursday October 29, 2009 through the following weekend, Mr. Kauffmann had occasional conversations with Mr. Dicker. Those conversations later were referred to in Mr. Dicker's article on Monday morning, November 2, 2009, and at some point during this time Mr. Kauffmann became aware that Mr. Johnson was going to pay for his ticket and was informed by Mr. Dicker that Randy Levine had stated that he did not invite the Governor to Game 1, as Mr. Kauffmann had understood from a prior conversation with the Governor (see 29., above). This caused Mr. Kauffmann to send an email to Mr. Nelson and David Johnson on October 30 asking for clarification about the invitation to the game. (Transcript, Kauffmann, p. 64-66; Exhibit 32).

36. Mr. Kauffmann then testified that, while he ascertained that Randy Levine did not invite the Governor to Game 1 at CNBC, he remained uncertain about who may have invited him because there had been a number of emails relating to a call from Lonn Trost, the COO of the Yankees, to Mr. Kauffmann's office along the lines "if the Governor wants to go to a play-off game, let me know." (Transcript, Kauffmann,p.67).

37. Mr. Kauffmann was asked about the protocol for the Governor dealing with signing documents as he has a disability and Mr. Kauffmann testified that the Governor is blind in one eye but he can read, although it is a pain-staking process with his face close to the desk reading letter by letter and signing his name. (Transcript, Kauffmann, pp.67-68).

38. On November 2, 2009 at 5:12 p.m., Mr. Kauffmann sent an email to David Johnson asking "Have the tickets been paid for yet?" because the Yankees had stated that they had not and the *New York Times* online edition was going to print at 5:30 p.m. with the story, notwithstanding that the Governor's check for the teenager's tickets (ex.3) is dated 10/27, Mr. Johnson's cover letter is dated 10/30 although the postmark is 11/7 (Exhibits 9 and 10) and Mr. Leinung's check is dated 11/1 (Exhibit 17). (Transcript, Kauffmann, p.69 Exhibit 30).

CONCLUSIONS OF LAW

The Governor is charged with violating sections 73(5)(a) and (b) and sections 74(3)(d), (f) and (h) of the Public Officers Law. Section 73(5)(a) prevents a statewide elected official, such as a governor, state officer or employee, among others, from soliciting, accepting or receiving:

any gift having more than nominal value, whether in the form of money, service, loan, travel, lodging, meals, refreshment, entertainment, discount, forbearance or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any such official action on his part.

In addition, section 73(5)(a) prohibits the offer or making of such a gift to any statewide public official, state officer or employee, while section 73(5)(b) prohibits a statewide public official from soliciting, accepting or receiving:

any gift, as defined in section one-c of the legislative law, from any person who is prohibited from delivering such gift pursuant to section one-m of the legislative law unless under the circumstances it is not reasonable to infer that the gift was intended to influence him;

Section one-c of the Legislative Law defines a "gift" to "mean anything of more than nominal value given to a public official in any form including, but not limited to money, service, loan, travel, lodging, means, refreshments, entertainment, discount, forbearance, or promise, having a monetary value." The following are excluded, in one-c, from this definition of a gift:

- (i) complimentary attendance, including food and beverage, at bona fide charitable or political events, and food and beverage of a nominal value offered as other than as part of a meal;
- (ii) complimentary attendance, food and beverage offered by the sponsor of an event that is widely attended or was in good faith intended to be widely attended, when attendance at the event is related to the attendees duties or responsibilities as a public official or allows the public official to perform a ceremonial function appropriate to his or her position

Section 74 of the Public Officers Law is the Code of Ethics and subdivision (3) sets forth the standards of that Code as it applies to any officer or employee of a state agency, member of the legislature or legislative employee. Any such officer or employee is prohibited: under section 73(5)(d), from using or attempting to use his official positions to secure unwarranted privileges or exemption for himself or others; under section 73(5)(f), from giving the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person; and, is charged, under section 73(5)(h), with endeavoring to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.

As the Respondent failed to appear at the hearing, the hearing officer was entitled to exercise her discretion and to conduct that matter *ex parte* pursuant to NYCRR section 941.12. Ample evidence was introduced to prove that the Respondent had been notified of the hearing and, indeed,

Respondent's Representative informed the hearing officer, through the Commission's Counsel, that "Governor Paterson declines the opportunity to participate in the Commission's hearing." (Hearing Officer's Exhibit 1). Hence, proceeding in an *ex parte* hearing was permissible.

Respondent, a statewide elected official, clearly solicited, received and accepted a gift of more than nominal value when he sought out tickets to Game 1 of the 2009 World Series from the Yankees. It is not quite so clear that this gift was intended to influence him, particularly because the Yankees do not make such gifts to public officials pursuant to their own strictly construed policy (paragraphs 2, 3), but it is more than likely that one could reasonably infer that this gift could reasonably be expected to influence him in the performance of his official duties at some point. There is no doubt that the Governor had his staff contact officials at the Yankees to ask about tickets for Game 1 (Findings of Fact paragraphs 4 and 26). Likewise, it is undisputed that the Governor received such tickets without payment in advance and attended the game with his son and the son's friend, and his aides David Johnson and Mark Leinung (paragraphs 1, 5, 10 and 25). Hence, the Governor violated Public Officer's Law section 73(5)(a).

It is far less clear that he likewise violated section 73(5)(b). This subdivision requires that Respondent have solicited, accepted or received any gift, as defined in Legislative Law section one-c, from any person who is prohibited from delivering such gift pursuant to Legislative Law section one-m unless under the circumstances it is not reasonable to infer that the gift was intended to influence him. The tickets by themselves would fall under the definition of gift in one-c but when coupled with the exclusion in one-c(ii) and the fact that the gift must be made by one who is prohibited from delivering such gift under section one-m, there is some doubt about whether they constitute a prohibited gift.

Generally, the Yankees are bound by the gift provisions in one-c, as they are registered lobbyists under the Legislative Law. However, they clearly are aware of this prohibition and of the exclusions to it found in one-c(ii). That section excludes from the definition of a gift "complimentary attendance, food and beverage offered by the sponsor of an event that is widely attended or in good faith was intended to be widely attended, when attendance at the event is related to the attendee's duties or responsibilities as a public official or allows the public official to perform a ceremonial function appropriate to his or her position." To ensure that they do not run afoul of these gift prohibitions the Yankees generally do not invite public officials to games, and they adamantly stated that they did not do so in this matter (paragraph 3). Further, they strictly enforce a policy of requiring payment of all tickets given to public officials unless they receive, from the Counsel to any such official, a letter indicating that the official is attending the game for a purpose related to his or her duties or responsibilities as a public official. The Yankees received such a letter from the Governor's Counsel and were directly informed that he would attend Game 1 "on official business" (Exhibit 4). Since it surely is undisputed that Game 1 of World Series at Yankee Stadium is a widely attended event and since the Governor was attending in his official role according to a formal letter from his Counsel, from the perspective of the team, the Yankees could not have made a gift to the Governor by providing him with tickets without receipt of payment in advance because the tickets they gave him were excluded from the definition of a gift under the provisions of Legislative Law one-c(ii). Thus, the Yankees seem to have a defense to any charge that they may have made an unlawful gift-as they intended by enacting their strict ticket policy-and some doubt is raised about whether the Governor may be found to have violated section 73(5)(b), which requires that the gift be one "as defined in section one-c of the legislative law." (Paragraphs 2, 3, 4, 5).

Indeed, there is significant confusion by the parties in this matter about the overlap of the Legislative Law gift provision and that found in the Public Officer's Law. Consistently, the Governor and

others who testified made clear that they understood that there was some sort of exemption from the gift prohibitions for widely attended events that included ceremonial importance, special occasions for the State, official capacity, etc. that enabled public officials to obtain tickets without payment under these special circumstances (paragraphs 23, 25, 31). The policy enacted by the Yankees, which required formal notification, that a public official was attending a game in his official capacity, while intended solely to protect the Yankees from offering or making a gift and thereby inadvertently violating the Legislative Law gift provision (and POL section 73(5)(b)), seemed to have served to confuse the public officials themselves about their obligations not to solicit, receive or accept gifts that are prohibited by the Public Officers Law, directly in section 73(5)(a) and indirectly in section 74. While certainly it is true that the Governor, as an attorney and with access to fine legal counsel, should have known enough to clarify any misunderstanding that existed in his office with respect to the law, it is possible that he was unaware of the extent of that misunderstanding.

Yet, this technical defense to the alleged violation of section 73(5)(b) and the confusion that seemed to cloud the decision making process in the Governor's office notwithstanding, the Governor cannot be held blameless in this matter. He clearly solicited the tickets, obtained them without prior payment and attended Game 1 with two teenagers and two aides. Much was made at the hearing about the fact that the decisions to offer payment at some point seemed to have been made after the game and likely in reaction to the inquiry by a reporter. While it is reasonable to assume that this was the case, the record is not crystal clear on this issue. Various parties testified to the timing of the actual payments, and to the timing of the intent to make said payments. In addition, an issue was raised about whether or not the Governor actually made out and signed the check that he ultimately used to pay for the teenager's tickets. The Governor claimed that he intended to pay, for the teenagers at least, at the Game and that he had a partially written check with him at that time but did not get a chance to use it at the game and only attended to it a day or so later, and the record shows that no payment was made until sometime after Game 1. Thus, it is not necessary to find exactly when the Governor intended to pay because the fact is that neither he nor the other guests at Game 1 made payment to the Yankees until sometime after the Game, possibly at the same time that public inquiries were being made about his attendance at the Game. Likewise, the issue of who actually wrote or signed the check is immaterial, especially in light of the Governor's disability which makes it likely that others often write and sign documents for him, in that who actually finally wrote and signed the check to pay for the tickets is of less concern than the fact that the tickets initially were solicited, received and accepted as a gift for which no payment was made. Hence, the Governor-at least technically-violated Public Officer's Law section 73(5)(b).

In addition to the violations of section 73(5)(a) and (b), the Governor violated section 74(3)(d). The Commission, by its predecessor agency, the Ethics Commission, has held that "[T]he Commission can conceive of few, if any, circumstances, in which the solicitation by a State officer or employee in his or her official capacity of a personal gift of any value would be appropriate behavior or be authorized by the provisions of Public Officers Law section 74" (Advisory opinion No.94-16, p.12, 1994). Soliciting tickets to Game 1 of the World Series when such tickets were not equally available to the general public and the occasion was not one where the Governor was to play a public role, constitutes using one's public position to "secure unwarranted privileges or exemptions for himself" and others in this context (paragraphs 8, 14, 15).

Likewise, it is possible, if not likely, that this course of conduct might raise a suspicion among the public that the Governor "is likely to be engaged in acts that are in violation of his trust" in violation of section 74(h). However, given the nature of the solicitation of these tickets, particularly the fact that the

Yankees did not give them as a gift *per se* but only because they received assurances that the Governor attended the game in an official capacity, it is unlikely that this would form a reasonable basis for “the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties” and thus would not support a finding that the Governor violated section 74(f).

An individual who knowingly and intentionally violates section 73(5) of the Public Officers Law is subject to a civil penalty in an amount not to exceed forty thousand dollars and the value of the gift received as a result of such violation. Any person who knowingly and intentionally violates section paragraphs b, c, d or i of subdivision 3 of section 74 of the Public Officers Law is subject to a civil penalty in an amount not to exceed ten thousand dollars and the value of the gift received. Thus, the Governor clearly is subject to penalties for violations of section 73(5)(a) and section 74(3)(d). As the violation of section 73(5)(b) is technical and is complicated by the intersections of the Legislative Law and the Public Officers Law, no penalty is recommended for that violation.

RECOMMENDED PENALTY

The Commission argues that the Governor should be assessed a penalty of \$96,375 which it bases upon finding the following violations: of section 73(5)(a), for which it recommends a \$40,000 plus the value of the tickets (\$42,125); of section 73(5)(b), for which it recommends the same penalty (\$42,125); and, of section 74(3)(d), for which it recommends a penalty of \$10,000 plus the value of the tickets (\$12,125). Thus, the Commission recommends the maximum penalty in each instance and further urges consideration of the fact that there may have been false and misleading testimony given under oath during the Commission’s investigation and that the Governor failed to appear at the hearing and gave only a single day’s notice that he would not appear. However, given the facts and circumstances of this matter, that approach seems unduly harsh.

The Governor knowingly and intentionally violated Public Officers Law section 73(5)(a) and section 74(3)(d) and technically section 73(5)(b). Yet none of these violations involved corruption or a persistent degrading of his public trust in office. At worst, they involved taking advantage of a public position for a one-time personal gain. Undoubtedly, this is a serious violation, particularly by one who should be expected to set an example for all other State officers and employees. Nonetheless, it involved neither long-term personal gain nor a fundamental debasement of his office. The Governor, using unsound judgment, solicited tickets to a baseball game. A suitable penalty would penalize him for the violations of law, as well as for the harm caused by his failure to use his official position to uphold the highest standards of ethics and integrity, without imposing punitive financial hardship. Thus, the recommended penalty is the value of the tickets (\$2,125), plus \$3,000 for the violation of section 73(5) (a) and \$5,000 for the violation of section 74(3)(d), for a total penalty of \$10,125. This is particularly fitting in that the violation of that section of the Code of Ethics found in Public Officers Law section 74(3)(d), which states that no officer or employee should use his public position to “secure unwarranted privileges”, is most likely to appear to the general public, and to other public officers and employees, to be a violation of the Governor’s public trust. No penalty should be assessed or enhanced for a failure to appear at the hearing, as that is a Respondent’s right and, while it may have been polite for the Governor to have given the Commission more notice of his intentions, it is not legally required and indeed may have been a decision made at the last moment by his legal representatives.

Respectfully submitted on November 18, 2010 by Christine C. Kopec, Hearing Officer,

Christine C. Kopec