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November 3, 2006

Re: Alan G. Hevesi, Comptroller of the State of New York

Dear Governor Pataki:

On October 27, 2006, I was engaged by you to serve in the capacity of Special Counsel in order to conduct an independent review of the findings and conclusions of the New York State Ethics Commission (the "Commission") regarding the actions and conduct of New York State Comptroller Alan G. Hevesi (the "Comptroller") that are the subject of the October 23, 2006 report of the Commission (the "Commission Report"). The Commission Report relates to the Comptroller's use of New York State employees to provide transportation and assistance for his wife. Following my independent review and analysis of the Commission Report I was to provide to you my findings and recommendations with respect to: (1) whether further factual inquiry, including the taking of proofs, is necessary before determining whether to recommend proceeding with removal; (2) whether a sufficient legal basis exists for you to recommend to the New York State Senate that the Comptroller be removed pursuant to Public Officers Law § 32 for violations of Public Officers Law § 74(3)(d) and (h); and (3) in the event that there is a legal basis for recommending removal, a

recommendation as to the strength of such a case. My engagement also includes, in the event of a removal proceeding, the preparation and trial before the Senate of any removal charge. My findings and recommendations at this juncture are set forth herein.

At the outset, I note that although the time frame within which you have asked me to perform my review has been compressed, you made clear to me that I should take more time if I felt that was necessary. Under the circumstances, I do not believe the time frame has hindered my review of the Commission Report or that more time to do that is essential. Given that my review has been confined at this juncture to the relatively limited set of facts that constitute the two-volume Official Record (the "Record") that has been developed by the Commission, and that those facts are not generally or reasonably in dispute, they can be digested in a fairly short period of time. There are however, certain legal issues relevant to my independent analysis and review that are far from clear under the current state of the law. The procedures that the Senate might use for any removal proceeding, for example, are for the most part unknown. However, this uncertainty stems from what would be the unprecedented nature of any removal proceeding pursuant to Public Officers Law § 32, and until the Senate establishes rules for such a proceeding, those procedures will remain unknown. A fair amount of uncertainty also exists as to whether removal would be for only the remainder of the Comptroller's current term or for the remainder of this term and a subsequent term should he, in the meantime, be reelected.

As set forth below, it is my view that there is a valid legal basis for a recommendation to the Senate that the Comptroller be removed and that aggravating circumstances of his conduct may very well warrant his removal from office. Nevertheless, without knowing the procedures the

Senate will employ to hear the evidence, and until I have the opportunity to personally assess the witnesses and evidence rather than rely solely on the Commission Report, and thus be confident that evidence can withstand the most rigorous standards that the Senate could impose, I do not feel that I am now in a position to advise you to proceed with a recommendation to the Senate for the Comptroller's removal.

I. The Commission's Investigation and Report

The Commission's investigation (the "Investigation") began shortly after a call was made to the Comptroller's toll-free hotline in late September 2006 raising questions regarding the Comptroller's alleged use of a State employee to transport his wife. (Comm'n Report at 6.) As part of the Investigation, the Commission took sworn testimony from twelve individuals, eleven of whom, including the Comptroller, had counsel present at the time their testimony was given.¹ In addition to obtaining testimony from individuals, the Commission developed its understanding of the relevant facts through a review of almost 2000 pages of documents obtained from those involved. (Comm'n Report at 8.) The Commission also afforded the Comptroller an opportunity to make a written submission, and on October 17, 2006, the Comptroller's counsel submitted a memorandum setting forth the Comptroller's position, which included a "Confidential Statement of Alan G. Hevesi

¹ Only Ihor Paul Stadnyk, an Investigator with the New York State Police in the Executive Services Unit Security Detail, who conducted a threat/vulnerability assessment with respect to Mrs. Hevesi, did not have counsel present while providing testimony to the Commission. (Stadnyk: 795-99.) There is no indication that the same opportunity afforded to the other witnesses to testify with counsel present was not provided to him, nor is there any indication that he wished to have counsel present.

to the New York State Ethics Commission in Furtherance of His October 12, 2006 Testimony.” (A: 2.)²

The Record created by the Commission consists of 824 pages of testimony and 749 pages of exhibits and other documents.³ Having reviewed the entire Record, it is my belief that the facts cited in the Commission Report, and upon which the Commission relies, are fairly and accurately represented and are consistent with the testimony and evidence contained in the Record. I saw nothing to suggest that the Record is incomplete, nor did I see anything that would call into question the adequacy of the Commission’s factual development during its inquiry.⁴ The Commission ap-

² Citations to the Record follow the conventions of the Commission Report. Accordingly, all references preceded by “E” are to the exhibits; and all references preceded by “A” are to additional items submitted to the Commission.

³ In addition to the 749 pages of documents in the Record, I understand that the balance of the “almost 2000 pages of documents” reviewed by the Commission consists of e-mails provided by the Comptroller that fall into two general categories. The first category relates to e-mails from the public in response to the Comptroller’s public statement on or about June 1, 2006 that Senator Charles Schumer should “shoot” President George W. Bush. The second category consists of e-mails related to the Comptroller’s handling of payments to State Corrections Officers. These e-mails apparently were not made part of the Record — nor did I review them — due to their late receipt by the Commission and the determination by the Commission that they did not contain direct threats. In any event, the Comptroller received these e-mails after Mrs. Hevesi’s confinement to a nursing home, and for that reason the Commission apparently considered them irrelevant to the assessment of Mrs. Hevesi’s security needs.

⁴ This is not meant to suggest that there are not issues that could be developed further if the factual record were reopened. However, I have no reason to believe at this time that any of those issues go to the heart of the matter or would affect the analysis and conclusions set forth in this letter.

pears to have met with the relevant individuals and to have questioned them adequately and appropriately and also to have obtained the relevant documents and reviewed them sufficiently.⁵

Based upon my review of the Commission Report and Record, there are no reasons of which I am aware to doubt that the Comptroller has, thus far, been afforded sufficient process and opportunity to present his position.⁶ The Commission made the Comptroller aware of the commencement and nature of the Investigation promptly. (Comm'n Report at 6-7.) In fact, the Comptroller's knowledge of the Commission's interest in the use of State employees to provide security and transportation to his wife is demonstrated by the Comptroller's own September 25, 2006 request that the Commission review his actions. (E: 7.) It also appears that the Comptroller was afforded ample opportunity to be heard. After setting forth his position in his September 25, 2006 request to the Commission that security for his wife was appropriate (E: 7), the Comptroller testified before the Commission for some five hours with two of his attorneys present. (Hevesi: 496-649.) At no point

⁵ On October 31, 2006, I was copied on an unsolicited letter and memorandum from the Comptroller's attorneys to the Executive Director of the Commission concerning the NYSP's threat assessment. In sum, the letter identifies what arguably is an inconsistency between the Trooper's written low threat risk assessment (E: 46) and Superintendent McMahon's subsequent letter to the Comptroller (E: 11) advising him of that assessment. While the Trooper's assessment "does take into consideration that Mrs. Hevesi's husband has been and continues to be a target of numerous threats and, to that extent, a risk is indicated," the Superintendent's letter states there is no such nexus. In any event, the discrepancy has no bearing on the Trooper's conclusion reported to the Comptroller, that there was a low threat risk. Accordingly, I do not believe this issue would have any bearing on the conclusions reached by the Commission, and it does not affect my conclusion.

⁶ I have been contacted by Mr. Hevesi's counsel, who asked to meet with me before I made my recommendation. I have declined their invitation because, as I informed them, my consideration at this juncture has been limited to the Record before the Commission.

during the Comptroller's testimony (or any other witness's testimony for that matter) did the Commission appear unwilling to allow the Comptroller to present his version of the facts or to consider the Comptroller's position. The Comptroller was also afforded the opportunity to make a written submission to the Committee (Comm'n Report at 7), and he did make such a submission following his testimony (A: 2.). Finally, the Comptroller's attorney noted in his letter enclosing the Comptroller's written submission that the Commission's Executive Director had described the cooperation received from the Office of the State Comptroller (the "OSC") as "unprecedented" (Hevesi: 644-45; A: 2), which further suggests that there has been ample opportunity for the Comptroller's position to be presented.

In sum, I conclude that the Investigation resulted in the development of a sufficiently complete and accurate factual record and that sufficient process was afforded the Comptroller during the Investigation.

II. The Conduct at Issue

A comptroller may be removed from office either by an impeachment trial, as set forth in the State Constitution, or by a removal proceeding before the Senate under Public Officers Law § 32.⁷ While impeachment charges are issued by the Assembly, a removal proceeding under

⁷ The relevant part of the statute provides as follows:

The governor before-making a recommendation to the senate for the removal of any officer may in his discretion take proofs, for the purpose of determining whether such recommendation shall be made.

§ 32 occurs at the recommendation of the Governor. This letter addresses your legal authority under § 32 to recommend removal to the Senate in light of the Comptroller's conduct. What follows is a brief summary of the most salient findings by the Commission that I have relied on in reaching my recommendations.

The record is replete with evidence that the Comptroller and his staff hired and assigned a State employee essentially to serve as a full-time chauffeur and personal aide to Mrs. Hevesi. This action was undertaken despite the Comptroller's knowledge that such assignment did

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The comptroller or attorney-general may be removed by the senate, on the recommendation of the governor, for misconduct or malversation in office, if two-thirds of all the members elected to the senate shall concur therein. No such removal shall be made unless the person who is sought to be removed shall have been served with a copy of the charges against him and have an opportunity of being heard. On the question of removal, the yeas and nays shall be entered on the journal. The governor may convene the senate in extra session for the investigation of such charges. The senate shall have power to make such rules as it may see fit for the practice before it. At the time appointed for the investigation, the senate shall proceed to hear and try the charges against such officer, and may take proofs in relation thereto.

The governor may appoint any suitable person to conduct the trial of such charges before the senate.

* * *

If the senate shall reject a recommendation of removal the secretary of the senate shall, by a writing signed by him and by the president of the senate, communicate the fact of such rejection to the governor. If the senate shall concur in such a recommendation the removal shall take effect upon the passage of the resolution of concurrence, and duplicate copies of such resolution, certified by the secretary and president of the senate, shall be executed and delivered by such secretary to the secretary of state.

N.Y. Public Officers Law § 32 (McKinney 2001).

not comport with the advice of the Commission. In fact, at the time of his May 2003 request to the Commission for an advisory opinion on the propriety of using a State employee to drive his wife under certain circumstances, the Comptroller failed to disclose to the Commission that he had already begun using at least one State employee to drive his wife. (Comm'n Report at 12.) Neither did his request disclose to the Commission that, while serving as Comptroller of the City of New York, the Comptroller had similarly used a City employee to serve as a driver for his wife, and that he later reimbursed the City for the expenses incurred in the use of such driver after the media began to report on the arrangement.⁸ (Comm'n Report at 12.)

At the direction of the Commission's advisory opinion, the Comptroller requested that the New York State Police conduct a threat assessment to determine whether Mrs. Hevesi warranted a driver for her security. That assessment found that the Comptroller's wife faced a "Low Threat Risk" based on the absence of threats to her and her relatively low public profile. (Comm'n Report at 15; E: 11.) Despite the suggestion by the Commission that the Comptroller report back any changed circumstances, he never did so. (Comm'n Report at 15; E: 11.) Instead, in direct contravention of the explicit advice of the Commission, the Comptroller informed the State Police that his office would conduct its own threat assessment. (Comm'n Report at 15; E: 24.) The Comptroller and his staff may have rationalized that it would be appropriate to make their own security as-

⁸ Despite his insistence that his reimbursement to the City was a "gesture" that was not required by law, the Comptroller acknowledged that he had stretched the very limited permission that was given to him by the City's Corporation Counsel to "occasionally" transport his wife into a "carte blanche" use of City employees — such that "occasionally" became usually and frequently. (Hevesi: 519, 607-08.)

assessment by taking out of context a reference in the Commission's advisory opinion that agencies often make such determinations in-house. (Comm'n Report at 15.) The Comptroller's authorizing his own staff to conduct a threat assessment after the findings of the State Police was clearly at odds with the unambiguous language of the advisory opinion that he not do so. Significantly, the Comptroller has described the Commission's letter as "clear and analytical." (Hevesi: 601.) Moreover, despite testimony by members of the Comptroller's security team that a risk assessment was performed by the Comptroller's Office (Johnson: 327-28), no written record of such an assessment has been produced. (Comm'n Report at 15-16.)

Notwithstanding the State Police's findings, the Comptroller continued to use a State employee, Nicolas Acquafredda, as her full-time driver and general aide. (Comm'n Report at 17; Hevesi: 612-13.)

The percentage of time that Mr. Acquafredda spent with Mrs. Hevesi increased between 2003 and 2006 as Mrs. Hevesi's health worsened, to the degree that Mr. Acquafredda spent 100% of his time with Mrs. Hevesi for parts of 2006. (Comm'n Report at 17-21.) The Comptroller admits that he was not authorized to use a State employee as a chauffeur for his wife (Comm'n Report at 23-24; Hevesi: 605), but nevertheless he caused Mr. Acquafredda's work for his wife to increase over time. (Comm'n Report at 19-20.) This was a decision made by the Comptroller himself, and one for which he accepts responsibility. (Comm'n Report at 23-24; Hevesi: 605.) While the Commission's advisory opinion had instructed the Comptroller to reimburse the State for any use of State resources unrelated to his wife's security needs, the Comptroller did not impose any record keeping requirements on Mr. Acquafredda or his superiors with respect to time spent serving Mrs.

Hevesi. (Hevesi: 632-34; E: 13.) Not until the media began to report on the Comptroller's use of a State employee as a driver for his wife did the Comptroller reimburse the State \$82,688.82. That figure was computed based on Mr. Acquafredda's own estimation of the percentage of time that he had spent with Mrs. Hevesi and is wholly unsupported by any documentary evidence. (Comm'n Report at 22-23.)

III. There Was a Knowing and Intentional Violation of the Law by the Comptroller Legally Sufficient to Justify a Recommendation of Removal

A. The Legal Standard for a Recommendation of Removal

A threshold question is what standard of proof applies to your decision whether to recommend to the Senate that the Comptroller be removed from office. There is no direct authority setting forth the quantum of evidence necessary to support a Governor's recommendation to the Senate that an official be removed for the "misconduct or malversation" proscribed by § 32. However, based on a review of relevant law, I believe that the applicable standard for recommendation is at most a preponderance of the evidence. This does not necessarily mean that a preponderance of evidence should be sufficient as a matter of policy to warrant a Governor's exercise of his discretion to recommend removal, but I believe it is the most that the law requires.

Under Public Officers Law § 36, which provides for the judicial removal of certain local officials, the standard of proof is a preponderance of the evidence standard. In a case involving the removal of a town supervisor, the trial court held that:

Although this proceeding is quasi-criminal in nature and requires a finding of wrongdoing and misconduct on the part of respondent, there is no evidentiary rule which

requires the same standard of proof in a proceeding under Section 36 of the Public Officers' Law as is required in a criminal proceeding. Respondent is of course protected to the degree that the burden of proof is upon petitioners to establish any misconduct, malfeasance, maladministration, or malversation on the part of respondent and such proof must be established by a preponderance of the evidence.

In re Baker, 386 N.Y.S.2d 313, 317 (Sup. Ct. 1976). If the ultimate standard of proof for removal by the finder of fact under an analogous statute is a preponderance of the evidence, it seems reasonable to conclude that the standard under § 32 for merely recommending a proceeding is likely no greater than a preponderance of the evidence. *See People ex rel. Loevin v. Griffing*, 152 N.Y.S. 113, 116 (App. Div. 1915) (citing Laws of 1910, ch. 559, § 33) (concluding that, where the statute at issue had requirements similar to § 32, such a hearing "imports written charges specifically alleging *substantial cause* for removal"); *see also In re Droege*, 197 N.Y. 44, 52 (1909) (finding that further review of a removal proceeding would be precluded after determining that there was a "substantial cause, as distinguished from a futile or frivolous prosecution").

B. Facts Satisfying the Preponderance Standard

Assuming the Senate were to find the Commission Report and the underlying Record from which it is drawn admissible at a proceeding for removal of the Comptroller before the Senate, there exists, as a matter of law, sufficient evidence that the Comptroller knowingly and intentionally violated § 74(3)(d) and (h) of New York's Public Officers Law to satisfy a preponderance of the evidence standard.⁹ In my estimation, the Comptroller violated sub-section (d) of the statute by us-

⁹

As set forth below, in the event the Senate were to impose an evidentiary rule prohibiting admission of the Record and Commission Report, I would need an opportunity to cultivate all available informa-

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ing his official position to secure an unwarranted privilege for himself and his wife — namely, the privilege of using a State employee to serve as a personal driver and general aide to his wife at the cost of the State. Similarly, I believe the Comptroller violated sub-section (h) of the statute by pursuing a persistent course of conduct relating to the procurement of a personal driver and general aide to his wife that has in fact raised suspicion among the public that he has engaged in acts violative of the trust placed in him as the chief state official in charge of the State’s finances.

Among the most probative evidence of the Comptroller’s violation of the relevant statutory provisions are his admissions, under sworn testimony, that it was his decision to assign what was essentially a full-time driver and personal aide to his wife at the State’s expense, and that his failure to timely reimburse the State was “irresponsible,” “inappropriate,” and constituted a “very serious error” for which he was “paying the price.” (Hevesi: 641.)

The Comptroller’s conduct in seeking an informal advisory opinion from the Commission on the propriety of using State resources to provide certain transportation to his wife and his subsequent disregard of the Commission’s opinion (Comm’n Report at 12, 17) is also highly probative of a knowing and intentional violation of the relevant statutory provisions. The Comptroller has taken the stance that he abided by the Commission’s opinion because, in accordance with its terms, he sought an independent threat assessment from the State Police, the State Police assessed a “low

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tion to determine whether there would be sufficient admissible evidence to satisfy whatever evidentiary burden the Senate chose to impose.

risk” threat level to Mrs. Hevesi, and he provided a State resource to provide security to Mrs. Hevesi commensurate with her low level of risk. (Hevesi: 612-18.) The Record does not reasonably support the Comptroller’s stated belief that, due to his public position, his wife was ever put at any physical risk. In fact, the Comptroller conflates his personal desire to provide his ailing wife with a driver and aide to assist her in her daily life, with his stated purpose of needing such driver and aide to protect her from risks that existed by virtue of his public position. (Hevesi: 617-21.) Even assuming that such a threat existed, the Comptroller’s choice of an individual with no law enforcement background, no special security skills, and no material connection to his security staff (Acquafredda: 10, 48-50), belies his assertion that the driver was for security purposes.

This evidence of the Comptroller’s intent to use State resources in the face of the State Police’s assessment, coupled with (1) his failure to timely reimburse the State for the use of such resources, and (2) his recognition that the Commission’s opinion directed him to reimburse the State when he used State resources in the absence of a legitimate security concern, is similarly probative of an intent to violate the relevant statutory provisions. Even absent his admission that he should have reimbursed the State earlier, the fact that the Comptroller had previously undertaken a nearly identical course of conduct that resulted in his later reimbursing the City of New York for the use of City resources is strong evidence of a willfulness to violate the relevant statutory prohibitions. His prior conduct undercuts any argument that his actions here were not knowing and intentional.

The Record also indicates that the Comptroller made efforts to conceal his use of State resources. The Comptroller’s failure to advise the Commission at the time he requested its advisory opinion that he already was using at least one State employee to provide transportation ser-

vices to his wife, coupled with his failure to advise the Commission of his prior personal use of, and subsequent reimbursement for, municipal resources while serving as Comptroller of the City of New York (Comm'n Report at 12), are both strongly probative of an intent to conceal.

The Comptroller, the State's chief auditor and the highest-ranking State official tasked with uncovering governmental fraud, failed to impose any record-keeping requirements or other internal controls on his staff to track and record the amount of State resources used to provide non-security services to his wife. (Hevesi: 632-34.) This failure simply suggests that the Comptroller acted in a deliberate fashion, particularly when viewed in light of his previous reimbursement for identical services to the City of New York (Comm'n Report at 11), and the Commission's express direction that he reimburse the State for the use of resources unrelated to legitimate security concerns for his wife (E: 13). Additionally, the Comptroller's office awarded Mr. Acquafredda a \$1,000 performance bonus in December 2005 for work supposedly performed in his office in 2005; however, in 2005 Mr. Acquafredda's job responsibilities were limited almost entirely to driving and providing general aid to Mrs. Hevesi. (Hevesi: 577-80; E: 18 at Tab B.) Such conduct strongly indicates an intent to violate the public's trust in his authority.

In sum, considering the Record as a whole, I believe there is a preponderance of evidence that the Comptroller knowingly and intentionally violated § 74(3)(d) and (h) of New York's Public Officers Law.

IV. The Strength of the Case for Removal

As discussed above, I believe there exists a valid legal basis for recommending removal under a preponderance of the evidence standard. Beyond whether there is a basis for a recommendation of removal, however, you have also asked for my views on the “strength” of the case for removal. I believe that the strength of the case is best evaluated by analyzing three factors: (1) the quantum of the evidence supporting a finding that the Comptroller violated the law; (2) the egregiousness of the Comptroller’s conduct; and (3) the quality and admissibility of the available evidence. It is my belief that the evidence gathered by the Commission provides strong support that a knowing and intentional violation of the law occurred and that the Comptroller’s conduct was egregious. However, unless and until it is determined whether the Record would be admissible in any proceeding before the Senate, I believe that a decision to seek removal would be premature at this time.

A. Quantum of Evidence

Section 32 is silent as to the standard of proof necessary for a Governor to recommend removal by the Senate. It is also devoid of any standard of proof for removal itself, and there is no binding authority on point.¹⁰ From a review of all relevant authority, however, it appears that

¹⁰ I have found evidence of at least seven removal trials conducted by either a special court of impeachment or the Senate, all but one occurring before passage of the 1894 constitution. The persons and the years they were tried are as follows: Canal Commissioner John C. Mather (1853); Canal Commissioner Robert C. Dorn (1868); County Judge and Surrogate Horace G. Prindle (1872); Justice John H. McCunn (Superior Court of the City of New York) (1872); Justice George G. Barnard (Supreme Court) (1874); Justice George Milton Curtis (Marine Court of the City of New York) (1874); and Governor William Sulzer (1913). Even if one assumes that these trials, none of which interpret

the applicable standard is less than the beyond a reasonable doubt standard applicable in criminal proceedings.

In the event you recommend that the Senate initiate a removal proceeding, however, it will be in the Senate's discretion to determine what standard of proof will be required to remove the Comptroller from office. The reasonable doubt standard is the highest level of proof required in the law and is generally only required for criminal penalties. Because the statutory provisions that the Comptroller is alleged to have violated are not criminal, and because removal is neither a criminal proceeding nor carries criminal penalties,¹¹ it is unlikely that the Senate would require that the Comptroller's violation of such statutory provisions be proven beyond a reasonable doubt.¹² Given the Senate's discretion on this point, however, it remains generally unclear what standard of proof it might apply in such a proceeding. In any event, based on the Commission's Report and the underlying record from which it is drawn, and *assuming the admissibility of both the Record and the Report*

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Public Officers Law § 32, are binding on the Senate here, I have found no resolution adopted in these trials by the Senate on the "court for the trial of impeachments" acting as a body that established a standard of proof for removal.

¹¹ Article VI, section 24 of the New York Constitution allows a court of impeachment to impose only two legal consequences for a wrongdoer: removal, or removal coupled with disqualification from future service in public office. These penalties are imposed not to punish for past conduct, but to benefit the state, *see Newman v. Strobel*, 259 N.Y.S. 402, 404 (App. Div. 1932), and they affect only those who have accepted public office and submitted to its rigors. Moreover, article VI, § 24 also explicitly declares that those who are removed may still be subject to criminal penalties.

¹² Cases applying the analogous § 36 have explicitly concluded that the standard for removal of local officials by a judge under that provision should be a preponderance of the evidence. *See In re Baker*, 386 N.Y.S.2d 313, 317 (Sup. Ct. 1976).

in a proceeding before the Senate, I believe the evidence establishes beyond a reasonable doubt that the Comptroller knowingly and intentionally violated the relevant statutory provisions.

The same evidence supporting my determination that there is sufficient proof to support a recommendation of removal of the Comptroller also supports my determination that the Comptroller has knowingly and intentionally violated the relevant statutory provisions beyond a reasonable doubt.

B. Egregiousness of the Comptroller's Conduct

There is no higher professional honor than to serve the public good. With that honor, though, comes an awesome responsibility. The Appellate Division has held Chief Judge Cardozo's celebrated standard of behavior for fiduciaries, that "[n]ot honesty alone, but the punctilio of an honor the most sensitive," should apply as the relevant standard of conduct for public servants. *Tuxedo Conservation & Taxpayers Association v. Town Board*, 418 N.Y.S.2d 638, 640 (App. Div. 1979) (quoting *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928)). Of course, not every breach of this rigorous standard by a Comptroller or other public official would constitute sufficient "misconduct or malversation in office" to justify a recommendation of removal pursuant to § 32. Rather, though not an explicit requirement of § 32, only conduct that is accompanied by aggravating circumstances such that the conduct rises to a certain level of egregiousness would seem to justify considering such a significant step as recommending removal.

It is difficult, if not impossible, to identify an objective standard by which to measure the level of egregiousness that ought to be present before a recommendation of removal is prudently

made. However, on this Record I am able to identify several aggravating circumstances that distinguish the Comptroller's conduct from lesser infractions that, while still violations that should not be condoned, would not rise to a level that would justify a recommendation of removal. In particular, the aggravating factors that I find most troubling are as follows:

- **The Length of Time:** Far from being a one-time or isolated incident, the Comptroller's conduct was ongoing and continuous for a significant length of time. At his direction (Comm'n Report at 12; Hevesi: 558-59), State employees began transporting his wife shortly after he assumed State office in 2003, and this continued until 2006. Particularly in light of the fact that this occurred *after* the Comptroller reimbursed the City of New York for nearly identical conduct between 1997 or 1998 and 2001 (Comm'n Report at 11), the Comptroller's current claim that he was acting in good faith (A: 2) throughout the entire period strains credulity. The Comptroller had to have been aware that at least some portion — if not most or all — of the transportation being provided for his wife was not for security purposes. The Comptroller must have been aware that he was obligated, as set forth in the advisory opinion from the Commission in 2003, to timely “reimburse the State for any costs incurred for the use of State resources to avoid the appearance that you are using your position as Comptroller for some unwarranted benefit for your wife.” (E: 13.) Despite this, the Comptroller made no attempt to reimburse the State until 2006, *after* the issue was raised in the media. (Comm'n Report at 22-23.) As suggested in New York State Ethics Commission Advisory Opinion No. 97-3, if reimbursement is made when the existence of a reimburseable expense is first discovered by an individual it may relieve an individual from liability for a violation. However, reimbursement made only when uncovered by the media or when politically expedient should not provide similar relief. *Application of Public Officers Law § 73(5)*, N.Y. State Ethics Comm'n No. 97-3 (Feb. 10, 1997).
- **The Failure to Keep Records:** Not only did the conduct continue for a significant duration without the Comptroller making any effort to reimburse the State, the Comptroller failed to take a single step to ensure that proper records were maintained so that the proper reimbursement amounts could eventually be calculated. (Comm'n Report at 22.) In my view, the Commission's conclusion that the “failure to keep any record that would allow for proper reimbursement suggests that [the Comptroller] did not intend to reimburse the State” (Comm'n Report at 24) is the most plausible inference under the circumstances and is indeed disconcerting. Such failure is even more troubling given the general importance of record keeping in the role of Comptroller, and the fact that this failure was in

violation of his office's own official record-keeping requirements for State agencies. (E: 17.)

- **The Pretext of Security:** There can be no doubt that the Comptroller's wife faces very serious health issues and most likely required the assistance of another individual on a regular and ongoing basis. Of course, many New Yorkers face similar unfortunate circumstances, and they do so without the benefit of a State employee providing such attention. This is not to say that the importance of legitimate security concerns facing public officials should be minimized, particularly in recent times. The facts developed by the Commission suggest, however, that the purported threat to the Comptroller's wife's security as a result of the Comptroller's elected position was *de minimis* if not nonexistent. Neither the Comptroller, security personnel, nor anyone else has ever suggested that outside threats were ever directed at the Comptroller's wife. Furthermore, the fact that the Comptroller's wife was being driven by a driver with no security training or background, and virtually no substantive contact with the Comptroller's security personnel, coupled with the fact that the individual did not view himself as providing security (Acquafredda: 10, 48-50), strongly contradicts the Comptroller's position that he believed security was being provided for his wife. Moreover, it appears that the driver's time with Mrs. Hevesi increased not in relation to any change in threat level but only in relation to an unfortunate increase in her health problems. The Comptroller's continuing conflation of security from threats with his concerns for his wife's well-being in light of her ongoing health concerns (Hevesi: 617-21) is disingenuous at best.
- **The Acts of Concealment:** Perhaps the most troubling aggravating circumstances are acts by the Comptroller and at his direction that suggest an attempt to conceal the true nature of the services being provided to his wife at the State's expense. These efforts of concealment occurred throughout the entire period, beginning with the Comptroller's failure to inform the Commission in October 2003 that two individuals were already providing transportation to his wife (one of whom had already been hired solely for that purpose (Chartier: 720-21, 724-28)) and that he previously had reimbursed the City of New York for similar services. (Comm'n Report at 12.) They continued with the Comptroller's failure to inform the Commission of the State Police's low threat risk assessment. (Comm'n Report at 15.) As time progressed, the transfer of Mr. Acquafredda to a different office, the alteration of Mr. Acquafredda's title, and the failure to take any effort to ensure Mr. Acquafredda's time was recorded properly, as well as the unusual way by which the executive staff referred to Mr. Acquafredda's responsibility for driving Mrs. Hevesi as a "special assignment" (*e.g.*, Gladstone: 220-23), all suggest an attempt at concealment as well. These omissions and affirmative acts are not insignificant, but rather indicate a conscious and ongoing effort by the Comptroller and his staff to conceal from the Commission and others his use of State resources for his personal benefit.

In sum, assuming the admissibility of the Record developed by the Commission, and putting aside additional concerns discussed below, I believe there is strong factual support for a recommendation of removal.

C. Quality and Admissibility of the Evidence

Notwithstanding that I believe there is a valid legal basis for a recommendation of removal and that there are aggravating factors that make the conduct sufficiently egregious, I do not feel that I am in a position to advise you at this time to proceed with a recommendation of removal pursuant to § 32.

Before a prudent prosecutor presents any case, it is absolutely essential to evaluate each piece of evidence and determine whether it will be admissible in the particular venue in which the matter is being tried. Critical to my determination that advising you to proceed with a recommendation for removal at this time is premature, is the fact that at this point I am not in a position to determine the ultimate strength of the case without knowing how rigorous the Senate's rules will be and, consequently, whether the evidence I have reviewed will be admitted and considered by the Senate. Public Officers Law § 32 provides limited guidance with respect to any removal proceedings that may be commenced: it expressly provides for the Governor's power to recommend removal to the Senate, requires notice, written charges, and a hearing, and guarantees "an opportunity of being heard" to the individual being charged.¹³ However, little other guidance is offered, and the Sen-

¹³ When this phrase has been interpreted in other New York statutes providing for the removal of public

ate has virtually unfettered discretion to “make such rules as it may see fit for the practice before it.” New York Public Officers Law § 32. Thus, the Senate will have many options as to how to proceed, and it is not possible to know what procedural rules the Senate might impose, what evidentiary rules it may choose to apply, or what level of proof it may consider appropriate. The Senate, for example, may choose to impose the more rigid requirements of New York’s Rules of Evidence in which case most of the Commission’s Record itself would not be admissible. Aside from the Comptroller’s testimony, the transcripts created during the Commission’s Investigation would, for the most part, be inadmissible hearsay under the New York Rules of Evidence, and there is no guarantee that similar testimony could be elicited during a Senate proceeding or that witnesses would not invoke their right not to incriminate themselves under the Fifth Amendment.¹⁴ As discussed above, assuming the admissibility of the Record, I believe satisfying even a very high standard of proof is possible, but without such an assumption it is impossible to know.

Though further investigation could yield evidence admissible under more rigorous evidentiary rules adopted by the Senate, there is no certainty that enough admissible

Footnote continued from previous page.

officials, courts have held that the opportunity to be heard includes the right to be represented by counsel, cross examine witnesses, and call witnesses in one’s defense. *See, e.g., People ex rel. Mayor of New York v. Nichols*, 79 N.Y. 582 (1880) (concerning mayor’s removal of police commissioner under the Laws of 1873, ch. 335, § 25); *People ex rel. Loevin v. Griffing*, 152 N.Y.S. 113, 116 (App. Div. 1915) (concerning mayor’s removal of health commissioners under the Laws of 1910, ch. 559, § 33).

¹⁴ Under the New York Rules of Evidence only portions of the Comptroller’s testimony likely would be deemed admissible.

evidence could be obtained to satisfy whatever quantum of proof, which is also unknown, the Senate decides is appropriate. To be prepared for any Senate proceedings in which the admissibility of the Record is limited, a prudent prosecutor would, at the very least, have to meet and evaluate each witness in person and (i) determine what information he or she may possess (inculpatory or exculpatory); (ii) evaluate each witness's credibility; (iii) determine how much each might be subject to damaging impeachment, and (iv) assess each witness's ability to withstand the rigors of cross-examination. The preparation would also necessarily include an opportunity to identify other relevant witnesses, and to gather evidence sufficient to rebut any points raised by the defense.¹⁵ In short, the challenge is to transform the extensive inculpatory information in the Record that was gathered for the Ethics Commission's purposes into evidence guaranteed to sustain the most rigid requirements the Senate could impose in a removal proceeding.

Aside from the issues flowing from the absence of guidelines for a Senate proceeding, there are other relevant considerations:

First, if upon your recommendation, the Senate were to vote by a two-thirds majority to remove the Comptroller, there is no precedent as to the scope of the Comptroller's removal. It is not certain, but it is likely, that a public official can be removed from office for conduct committed

¹⁵ For instance, in his defense, the Comptroller is likely to argue with some force and produce evidence that (i) he has enjoyed a long and distinguished career as a public servant; (ii) given the genuine concerns for his wife, the low threat assessment by the NYSP afforded him a good faith basis to assign a low-level security detail; and (iii) he acted in good faith by both raising the issue and in following the Commission's advice..

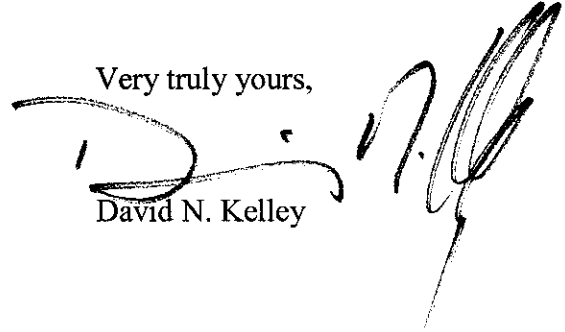
during a previous term. *See, e.g., In re Hayes*, 351 N.Y.S.2d 30 (App. Div. 1974); *Newman v. Strobel*, 259 N.Y.S. 402 (App. Div. 1932); *see also* New York Senate Judiciary Committee, *New York's Impeachment Law and the Trial of Governor Sulzer: A Case for Reform*, at 38 (1986) ("Consequently, the weight of authority justifies the application of impeachment to misconduct that occurs: (1) in office; (2) during a prior term of office or; (3) while an official is seeking public office."); Thomas J. Goger, *Removal of Public Officers for Misconduct During Previous Term*, 42 A.L.R.3d 691 (2006). However, the law is less settled as to whether an official may be charged for misconduct in a prior term if he is reelected after his offense "had been exposed to the public before election, and had been made an issue during the campaign, and, notwithstanding his wrongdoing, he had been successful at the polls." *Newman v. Strobel*, 259 N.Y.S. 402, 404-05 (App. Div. 1932). The idea that reelection could somehow negate an official's prior wrongdoing under certain conditions has been considered and treated as plausible, despite the fact that the State Constitution allows a court of impeachment to disqualify a person from holding future office. *See* N.Y. Const. art. VI, § 24. Therefore, a great deal of uncertainty exists as to whether the appropriate removal would be for only the remainder of the Comptroller's current term, or for the remainder of his current term and his next term if he should be reelected on November 7, 2006.

Second, the uncertainty as to what rules will be adopted in any removal proceeding also precludes an accurate prediction as to how long removal proceedings may take. Depending on the Senate's decision, it is possible that the proceedings could be protracted, which you may conclude might unduly impede the legislative process. Moreover, any removal proceeding could be the

subject of prolonged due process challenges in the courts and increase the burdensome nature of the process.

Of course, I am available for further discussion or action as you shall require.

Very truly yours,

A handwritten signature in black ink, appearing to read "D. N. Kelley", is written over the typed name. The signature is stylized and cursive.

David N. Kelley

Honorable George E. Pataki
Governor, State of New York
State Capitol
Albany, New York 12224

VIA E-MAIL

cc: Richard Platkin, Esq.