

**State of New York
Office of the Inspector General**



**Investigation of Allegations Concerning Creation
of Executive Director Position
at the State Commission of Correction**

November 2008

**Joseph Fisch
State Inspector General**

INTRODUCTION

Allegation and Summary of Findings

On February 15, 2008, the New York State Inspector General received a complaint of misconduct by Dennis Langley, Director of Human Resources Management at the New York State Division of Criminal Justice Services (DCJS). It was alleged that Langley acted improperly by submitting a request to the New York State Civil Service Commission seeking to establish an Executive Director position at the New York State Commission of Correction (SCOC), using SCOC letterhead without the involvement or approval of the SCOC Chairman. The complainant further alleged that Langley's actions might have violated ethical and criminal statutes.

While investigating this complaint, the Inspector General also received allegations that efforts at DCJS to create an Executive Director position within the SCOC violated Correction Law § 44, which designates the SCOC chairman as the agency's appointing authority.

The Inspector General determined that Langley acted at the direction of DCJS Commissioner Denise O'Donnell and Deputy Commissioner and Counsel Mary Kavaney, who were acting pursuant to the authority of the Governor's Appointments Office. The Inspector General established that there exists substantial legal support for the Governor's authority to create a position within any agency in the Executive Department, including the SCOC, particularly to remedy deficiencies in that agency. However, the Inspector General recommends that in a similar situation in the future, a better approach would be for DCJS officials to advise the SCOC Chairman of their intentions.

As no one was appointed to the Executive Director position, the Inspector General finds that the SCOC's appointment powers under Correction Law § 44 were not usurped. Indeed, the Inspector General found that DCJS officials intended that no actual appointment would occur except under the auspices of the new SCOC Chairman.

The Inspector General finds no evidence to substantiate ethical or criminal law violations.

The State Commission of Correction

The SCOC is a body established by the New York State Constitution and mandated to “visit and inspect, or cause to be visited and inspected by members of its staff, all institutions used for the detention of sane adults charged with or convicted of crime.” Prior to 1973, the New York State Constitution provided that the Commissioner of the Department of Correctional Services was the Chairman of the SCOC. In 1973, in the aftermath of the 1971 riots at Attica Correctional facility and subsequent official inquiries into the causes of the riots, it was determined that it was inappropriate for the SCOC to be headed by the Commissioner of the Department of Correctional Services, the head of one of the agencies it was required to oversee. The State Constitution was amended, eliminating the reference to the Commissioner of the Department of Correctional Services and the SCOC was redesignated as an independent body within the state Executive Department, one of the administrative divisions of the state Executive Branch. Under New York State law, the Governor is the head of the Executive Department. The 1973 law further provided that no Commissioner could serve as such while employed by any state or local correctional authority. Under the 1973 law, the

SCOC commissioners served in a part-time capacity while the daily operations of the SCOC were supervised by a full time administrator.

The SCOC as currently constituted was established in 1975 through enactment of Article 3 of the New York State Correction Law. Based largely upon a scathing evaluation of the SCOC issued by the Temporary State Commission of Investigation (SCI), the legislature determined that a part-time commission was insufficient to fulfill the duties entrusted to the SCOC.¹ Accordingly, since 1975, the commissioners are mandated to “devote full time to their duties and . . . hold no other salaried public position.”

The SCOC currently consists of three commissioners appointed by the Governor upon advice and consent of the Senate. The commissioners are appointed to five-year, staggered terms. One of the three commissioners is designated by the Governor as chair of the commission and serves in that capacity at the Governor’s pleasure. The SCOC is entrusted with numerous duties; the first duty cited is to “advise and assist the governor in developing policies, plans and programs for improving the administration of correctional facilities and the delivery of services therein.” The SCOC is also required to monitor the conditions at local correctional facilities and recommend improvements to ensure their safety.

There are two separate bodies contained within the SCOC. The Citizen’s Policy and Complaint Review Council (the “Council”), consisting of nine individuals appointed by the Governor, investigates grievances and complaints relating to inmates in local jails.

¹ Reminiscent of the expressed concerns which motivated the DCJS officials in the matter under review, the SCI found that the SCOC had failed to fulfill its legislative mandate and determined that a cause of this failure was a lack of effective leadership and direction.

The Correction Medical Review Board (the “Board”) consists of six people appointed by the Governor and reviews the circumstances of inmate deaths and the provision of medical care to inmates. The Council and the Board are each headed by one of the SCOC commissioners not designated as chair of the SCOC.

The chair of the SCOC is the chief executive officer of the commission, board and the council. Relevant to this inquiry, Correction Law § 44 provides:

The chairman may appoint such assistants, officers and employees, committees and consultants for the board and the council as he may determine necessary, prescribe their powers and duties, fix their compensation and provide for reimbursement of their expenses within amounts appropriated therefore.

...

The chairman may, from time to time, create, abolish, transfer and consolidate bureaus and other units within the commission, the board and the council not expressly established by law as he may determine necessary for the efficient operation of the commission, the board and the council, subject to the approval of the director of the budget.

The Hosted Agency Relationship

Relevant to the issue under examination, the SCOC is a “hosted agency” whose human resources matters are administered by a separate agency, DCJS. There are many such host agency relationships within New York State government with DCJS, the Office of General Services, the Division of the Budget and other large entities each performing administrative services for multiple smaller agencies.

The host agency concept was originally developed in the early 1990s as a money-saving measure to reduce costs by having larger agencies perform certain administrative functions (particular Human Resources Management and Management Information Services) for smaller agencies, thus taking advantage of institutional knowledge and

economies of scale.² The Division of the Budget has historically encouraged these arrangements which have generally proven to serve their purposes, and new host agency relationships are created and renewed annually. In addition to cost savings, the host agency concept has reportedly afforded smaller agencies access to specialized services and enhanced resources to assist them in their respective missions.

Donald Capone, a former Division of the Budget employee who helped create the “host agency” concept and current DCJS Deputy Commissioner for Administration, testified that no statute or regulations were ever promulgated detailing the specifics of the host agency concept. Indeed, Capone testified that when developed, there was “no high level of detail [or] a whole lot of implementation discussion about how it was going to work”; rather, the concept was merely incorporated into a series of budget bills and the agencies themselves were left to determine the day-to-day logistics of their individual arrangements.

The Inspector General’s investigation revealed agreement about the general authority vested in the host agency. Capone testified that host agencies were not granted authority over substantive decisions of the hosted agency, but rather, were intended to assist the hosted agency and defer to the hosted agencies’ reasonable judgment in these matters. Mark Bonacquist, who was employed by the SCOC at the time it became a hosted agency and is currently Deputy Counsel for DCJS, agreed that DCJS’ role as a host agency is “ministerial.” Alyce Ashe, who held the position of DCJS Director of Human Resources Management prior to Dennis Langley, reiterated this understanding

² According to the Division of the Budget, this concept “is designed to produce savings through increased administrative efficiencies.” (see <http://www.budget.state.ny.us/pubs/archive/fy0506archive/fy0506app1/human.pdf>).

and testified that in its capacity as a host agency, DCJS “handled the paperwork” for the SCOC and other hosted agencies, but could not “mandate” a hosted agency’s underlying decisions. Instead, DCJS serves to assist the hosted agencies in implementing their determinations.

THE INSPECTOR GENERAL’S INVESTIGATION

Creation of the Executive Director Position

At the time of Governor Eliot Spitzer’s election in November, 2006, the three sitting SCOC commissioners were Daniel Stewart, Chairman; Frederick Lamy, Commissioner and head of the Medical Review Board; and Frances Sullivan, Commissioner and head of the Citizens Policy and Complaint Review Council. Stewart was appointed Commissioner and Chairman in June 2006 with a term expiring in December 2010. Although Stewart’s term extended to 2010, Lamy’s term expired at the end of 2007. Stewart testified that prior to accepting the nomination for the SCOC chairmanship he was informed by officials from then-Governor George Pataki’s administration that the incoming new administration would most likely designate their appointee to fill commissioner Lamy’s position as Chair and Stewart accepted the nomination with this understanding. Stewart further testified that he, therefore, fully expected the Spitzer administration to designate the newly appointed commissioner as chair and that he wished to assume the duties of head of the Medical Review Board upon the new Chairman’s confirmation.

With the impending expiration of Lamy’s term, during December 2007, Francine James, the Governor’s Deputy Secretary for Appointments, assembled a panel to

interview candidates from which Governor Spitzer could choose to nominate as SCOC Chair. This panel consisted of Denise O'Donnell, Commissioner of DCJS and Assistant Secretary for Criminal Justice to the Governor; Mary Kavaney, DCJS Deputy Commissioner and Counsel; Mark Bonacquist, DCJS Deputy Counsel; and Mary Burnett of the Governor's Appointments Office. Although James, in her capacity as Deputy Secretary for Appointments, headed the search, she did not attend all of the interviews and meetings conducted by the panel.

From the DCJS perspective, at the time of the interviews, the SCOC was regarded as in critical need of new direction and institutional reform. Prior to commencing the interview process, O'Donnell and Kavaney recognized serious deficiencies in the SCOC. In this respect, O'Donnell occupies several positions within New York State Government relevant to the functioning of the SCOC. First, O'Donnell serves as the Commissioner of the Division of Criminal Justice Services, the host agency of the SCOC; second, O'Donnell serves as the Governor's Assistant Secretary of Criminal Justice, responsible for assisting in the implementation of the Governor's criminal justice policies; third, O'Donnell serves as the state Director of Criminal Justice. Originally created by Governor Mario M. Cuomo in 1983 and continued by Governors George E. Pataki, Eliot Spitzer and David A. Paterson, the Director of Criminal Justice is charged with the primary responsibility and accountability for coordination within the state criminal justice system including the operations of the SCOC. Under this authority, O'Donnell charged her Counsel Kavaney with holding weekly meetings with the SCOC in order to gain insight into its operations and discuss issues confronting the agency. Kavaney engaged in numerous such meetings, over 30 at the time of her interview with the Inspector General,

at the SCOC offices. Kavaney testified that Chairman Stewart did not attend these meetings which were instead attended by SCOC Counsel Michael Donegan and/or SCOC Director of Operations James Lawrence.³ Kavaney added that based upon her review of SCOC operations and information gleaned from her weekly meetings with SCOC staff, Chairman Stewart was not supervising the daily operations of the agency. She testified that she rarely observed Stewart at the SCOC offices and determined that the day to day functioning of the agency was instead relegated to Donegan and Lawrence.⁴

DCJS officials testified that they had received many written and oral complaints from sheriffs' offices and other local government officials about the current staff of the SCOC.⁵ They further testified as to their concern that the SCOC was not fulfilling its statutory mission. Specifically, Commissioner O'Donnell and Deputy Commissioner Kavaney testified that there had been many complaints to the Governor's Office and DCJS by various county officials and the New York State Sheriffs' Association that the SCOC was using its authority in an arbitrary and vindictive manner. According to O'Donnell, the complaints were that "the tone often that came from the Commission was unprofessional." Kavaney testified that she had spoken with a number of sheriffs who complained to her that the SCOC "played favorites," a problem she said she understood had existed for a long time. However, Kavaney recognized that SCOC's mission is "not

³ Interestingly, despite numerous such meetings both before and after the current allegations came to light, SCOC officials never raised the Executive Director matter with Kavaney at these weekly meetings.

⁴ In response, Stewart testified that as Chairman of the SCOC he did not feel obligated to meet with Kavaney, Deputy Commissioner and Counsel to another agency. Stewart acknowledged the tension between the SCOC and local governments and stated that he had been travelling the state in an effort to improve relations with county officials. Moreover, while recognizing historic heavy-handedness in their tenor, Stewart stated that Donegan and Lawrence possessed valuable expertise and that he had addressed with them the manner in which they interacted with local government officials.

⁵ While it was also reported that there were administrative problems within the SCOC, investigation disclosed that these issues stemmed from one apparently disgruntled employee.

an easy regulatory role.” Bonacquist testified that he had heard complaints about SCOC executive leadership from the Sheriff’s Association and individual sheriffs. “For anyone who’s in corrections, it’s not really a secret, the unhappiness that exists,” Bonacquist testified, adding that the problems dated to the mid-1990s.

In his testimony to the Inspector General, Stewart did not substantially dispute this view of the SCOC, acknowledging that there had existed “terrible animosity” between the agency and county governments, particularly sheriff’s departments. Stewart attributed this contentiousness to SCOC’s statutory responsibility to enforce jail standards as well as the past conduct of SCOC management, which he described as “cockiness” and a “holier than thou” attitude. Stewart testified that the criticism was directed specifically at Alan Croce, his predecessor as SCOC Chairman, and SCOC Counsel Michael Donegan and Director of Operations James Lawrence, both of whom still serve in those positions at the agency. However, Stewart testified that he believed that SCOC’s relationships with local governments had improved during his tenure as Chairman.

In light of what she recognized as SCOC’s institutional problems, Kavaney expressed that it would be difficult for one person, a new chairman, to change the culture of the agency. Moreover, according to Kavaney, based upon the organizational structure of the SCOC – comprised near exclusively of employees with civil service protection – the new Chairman’s ability to appoint executive staff to facilitate reforming the agency would be limited.

During the interview process for a new SCOC Chairman in early December 2007, the idea of creating an Executive Director position within the SCOC to implement the

new Chair's policies and run day-to-day operations was raised within the panel.

Bonacquist, who worked in the SCOC counsel's office from the mid-1980s to 1999, testified that he recalled first mentioning to Kavaney in the late summer or early fall of 2007, when they informally discussed problems at the SCOC, that an Executive Director position had previously existed at the agency but had been abolished in 1989.

The idea resurfaced during the panel's activities in December 2007. Kavaney testified she had informed James about the problems in the SCOC and the institutional impediments she saw in addressing these problems, and that James, "thinking out loud," spoke of establishing an Executive Director position in the SCOC to assist the new chair.

Kavaney testified that once James articulated the "notion" of possibly creating an Executive Director position at the SCOC, the panel was asked to keep that possibility in mind while concluding the interviews to determine if any applicant for the commissionership would be well-suited to fulfill that additional role. Kavaney testified that at the close of the second day of interviews two of the five candidates interviewed stood out from the rest: Thomas Beilein, then Niagara County Sherriff, for the position of chair, and Philip Miller, a former SCOC employee who is now retired, for the position of Executive Director.

O'Donnell provided an account similar to Kavaney's, testifying: "[O]ut of the group the idea came up, I believe it was from Francine James, that maybe we could put both of them at SCOC if that would be what the Governor would want to do and ultimately if . . . whoever was named as commissioner wanted to hire Mr. Miller . . . that might really bring both the professionalism and the knowledge of corrections and be a

really solid team to go into an agency that I felt was both troubled and had very strong personalities and mindsets that may be difficult for one person to handle.”

Bonacquist also recounted that Beilein and Miller appeared most qualified. Bonacquist testified that panel members felt “Miller and Beilein are both good, it’s a shame we can’t use both of them in some capacity. And that’s how it came up . . . how about an Executive Director position for Miller . . . both of them could help change things there . . . and everyone went, ‘that sounds like a good idea.’”

Soon after the interviews had concluded, Kavaney testified, she was instructed by O’Donnell to draft job duties for a potential Executive Director position at the SCOC and to also recommend candidates for the two positions — the Chair and the Executive Director.

Shortly after the panel completed its work, Kavaney, acting on O’Donnell’s instructions, instructed DCJS Director of Human Resources Management Dennis Langley that based on “an indication from the Governor’s appointment’s office . . . they would like [DCJS] to pursue the establishment of an Executive Director position” within the SCOC. According to Kavaney’s testimony, the idea behind the position was eventually to have the chair charged with interacting with county officials and local sheriffs while the Executive Director would be responsible for the day-to-day operations of the agency. To this end, on December 6, 2007, Kavaney in an e-mail to Bonacquist described DCJS’s vision of the type of individual who would be well-suited for the Executive Director job: “I would start with a working knowledge of both state [and] county correction’s operations as [well] as the Correction’s Law and Scoc’s statutory mandate under the Correction’s Law. Also to be able to do a top to bottom inventory of Scoc’s current

operations as [compared] to its obligations under the correction's law and see if the most critical operations [are] being completed." Kavaney further asked that Bonacquist add his own thoughts to her suggestions in drafting the job duties.

As he commenced drafting job duties for the intended position, Langley, having learned that such position had once existed at the SCOC, reviewed the job duties of the previously existing position and used these as a template for drafting job duties for the position he was assisting in creating. On December 10, 2007, Langley e-mailed O'Donnell a draft of the proposed job duties for the Executive Director position. In response, Langley testified, O'Donnell informed him by telephone that she was "awaiting final word from the Governor's Appointment's Office, an approval before we were to send it out." Kavaney similarly informed him of the role of the Appointments Office in the process.

In an e-mail dated December 12, 2007, O'Donnell directed Langley to proceed with the request to Civil Service. She stated in the e-mail:

Dennis: Please send the request for the Executive Director position at SCOC to Civil Service. Indicate this is being done at the request of the Appointments Office in conjunction [with] a search for a new Board Chair at SCOC for the purpose of strengthening the leadership and management of the agency. It has not yet been discussed with the agency. Any questions should be directed to you. Please cc Francine James. Thanks, Denise.

On December 14, 2007, Langley submitted letters to the Civil Service Commission and Department of Civil Service's Director of Classification and Compensation, seeking "approval for placement" of the Executive Director position in the exempt class. Notably, these letters appeared on SCOC letterhead and were signed by Langley as "Director of Human Resources Management".

That same date, Langley e-mailed James regarding the status of Executive Director position. Langley informed James that:

The request to establish an exempt Executive Director position for the State Commission on Correction has been forwarded to the Department of Civil Service. For your information, I have attached a copy of the following documents associated with our request:

- The cover letter and duties statement forwarded to The Division of Classification and Compensation requesting the position be classified.
- The letter to the Civil Service Commission requesting that the position be placed in the exempt jurisdictional class.

On that same date, December 14, 2007, Kavaney e-mailed James and O'Donnell a memorandum recommending that Beilein be nominated for chairman and Miller be considered for the Executive Director position. The memorandum, drafted by Kavaney and Bonacquist, spelled out the respective qualifications of Beilein and Miller along with the positive references provided by officials who had worked with them in the past.

Civil Service Law Requirements for Creation of the Executive Director Position

As stated above, the intent of the originators of the concept of an Executive Director position at the SCOC was for the individual selected to serve in an executive management capacity at the pleasure of the chair of the commission. Under New York State law, unless otherwise created by statute, full-time positions are designated as either in the competitive, non-competitive or exempt class. The former two categories require some form of examination and do not serve at the pleasure of the head of the agency. In contrast, employees in exempt classified positions may be selected without examination and serve at the will of the head of the agency. Accordingly, the Executive Director position was sought to be placed in the exempt class.

The Director of Classification and Compensation of the Department of Civil Service is charged by statute with determining the proper classification of a position. The Director, who must be in the competitive class himself, is appointed by the President of the Civil Service Commission who, in turn, is one of the state's three civil service Commissioners and serves in that capacity at the pleasure of the Governor. In order for a position to be properly classified as exempt, the Director must examine various factors including: the confidential nature of the position, the performance of duties which require the exercise of authority or discretion at a high level, or the need for the appointee to have some expertise or personal qualities which cannot be measured by a competitive examination. The Director's determination is then reviewed by the Civil Service Commission at their monthly meetings. Notably, neither the Director of Classification and Compensation nor the Civil Service Commission appoint or review the appointment of any person to fill a position. Moreover, approval by the Department of Civil Service is merely a first step in creating an exempt position.

Once such an exempt position is authorized by the Director of Classification and Compensation and the Civil Service Commission, pursuant to Civil Service Law § 121, the position must be approved by the Director of the Budget to determine the fiscal viability of the position. The Director of the Budget is the head of the Division of the Budget and a gubernatorial appointee holding office at the pleasure of the Governor. In reviewing a position approved by the Department of Civil Service, the Director of the Budget is not bound by the Department of Civil Service's determination and may disapprove the classification and creation of the position. Once again, similar to the

Department of Civil Service, approval by the Director of the Budget does not constitute appointment of a particular person to a position.

If a position is classified as exempt by the Department of Civil Service and approved by the Division of the Budget, in order to appoint a specific individual to that newly created position and set his or her actual salary, the agency, through its head (in this case whoever occupies the chair of the SCOC), still must engage in the process for hiring a specific individual. Historically, within the Executive Department, this requires consultation with and review by the Governor's Appointments Secretary.⁶ Under the New York State Constitution and state law, the Governor, through the Director of the Budget, has ultimate authority over any appropriations (which necessarily includes the salaries of exempt employees) of the departments of the executive branch.⁷

The Authority to Establish Executive Director Position

All participants testified that there was never a discussion in the group about the source of their authority to create an Executive Director position within the SCOC; rather, it was assumed under various theories that this authority existed. Notably, O'Donnell and others emphasized the distinction between *establishing* the position on paper and *filling* it with an actual appointee.

O'Donnell testified that she "thought and understood" that she and the Appointments Secretary had the authority to request the Civil Service Commission to

⁶ There is no dispute about the propriety of the Governor's role in vetting individuals for executive employment within the SCOC. Indeed, SCOC Counsel Donegan testified that he first obtained his position through contact with Governor Pataki's office.

⁷ Executive Law § 180

establish the Executive Director position at SCOC, adding “I wouldn’t do it without the okay of Appointments.” O’Donnell testified:

And I think it’s important that we were operating with a public purpose in mind, so this wasn’t being taken for any personal reason or to fulfill some other goal than other than to create the structure to better manage this agency. I think the Governor is responsible ultimately for the agency, I think the Appointments Office is responsible to ensure that you have the executive team in place to properly manage an agency, and that was to some extent my only responsibility at DCJS to do, as well.

Kavaney also pointed to the Governor’s Appointments Office as the source of the authority to create the position. Kavaney testified that because she had been told by James that the Appointments Office had created comparable positions in other agencies, she “was assuming . . . they had the authority to do it.”

O’Donnell testified that she viewed the request to Civil Service as a way “to find out if the position still existed there or if we could get a reading from Civil Service if it could be created. I didn’t initially know that meant actually creating the position, but learned through the process somehow that it meant you had to really create it, they weren’t going to say, ‘yes, you can do it.’ So it turned out to actually signing and requesting them to create the position.”

Summarizing the requirements of the aforementioned Civil Service and Division of Budget requirements, both O’Donnell and James said that they viewed creation of the job as a preliminary step. O’Donnell testified that “to me, it was creating options to see what options were available for this agency.” Similarly, James testified, “we were trying to create the position as an option” for the incoming Chair.

O’Donnell further testified that while she thought she had the authority, with the Governor’s Appointments Secretary, to establish the Executive Director position, “I don’t

think we have the authority to fill it, I know we didn't. . . . The governor may have, but it didn't get to that stage." The same distinction was made by Bonacquist, who testified, "Hiring someone to go to work now, I think, would be inappropriate, but I didn't view that as what we were doing." The actions taken were consistent with the Correction Law, Bonacquist stated, "because we're not appointing a position."

O'Donnell and Bonacquist also testified it was their intent that the Executive Director position, if created, would be filled, if he so chose, at the discretion of the SCOC's new chairman. According to O'Donnell, "the focus here was to get approval for a position that had existed at the agency before, in the event that the new chair of the commission wanted to fill such a position." O'Donnell further testified, "it would never take place unless there was a change in leadership at the agency."

Civil Service Approves Request to Create Executive Director Position

Some time in January 2008, a member of Langley's staff was informed by employees of the Department of Civil Service that the Executive Director position had been approved by staff and, therefore, could be considered by the Civil Service Commission at its next meeting, scheduled from February 12-13, 2008. On January 11, 2008, O'Donnell sent James a memorandum entitled "Problems & Issues Confronting the State Commission of Correction" enumerating a list of "[f]unctions not being carried out or that have not been carried out satisfactorily." While Kavaney was not involved in the drafting of this memorandum, she testified that she had knowledge of the information contained within it.

The memorandum noted that the SCOC's staff "has been cut about 70% over the past several years, resulting in its failure to address integral functions." According to the memorandum, these neglected areas included: "regular inspection of all correctional facilities, lockups, and OCFS juvenile offender facilities; promulgation of minimum standards for OCFS juvenile offender facilities; investigation of complaints and grievances; recommendations to administrators for improving the operation of their facilities; and investigation of the condition of systems for the delivery of medical/mental health care to inmates."⁸

Once Civil Service approved the classification of the position as properly exempt, the Division of the Budget was required to approve and ensure that money existed to fund the title. On February 5, 2008, Langley e-mailed Kavaney to inform her that a Division of the Budget supervisor would review the position and the salary it entailed. Later that day, Kavaney e-mailed James and informed her:

Francine: final sign off of the Executive Director has to be done by the supervisor that has scoc in the dob group. I called that supervisor and asked her to approve it asap and send confirmation of the salary. She is doing that now and I will forward to you.

On February 6, 2008, the Division of the Budget supervisor e-mailed Kavaney and stated that DOB had approved the Executive Director position at a proposed annual salary of \$100,000.

⁸ Independent of the Governor's Office or this investigation, similar deficiencies in the SCOC were identified in a recent audit conducted by the Office of the State Comptroller ("OSC"). In its audit report issued on August 25, 2008, OSC concluded that the SCOC was not fulfilling its responsibilities for overseeing State correctional facilities, as it stopped inspecting State prisons when its staffing levels were reduced during the 1990s. The OSC also found that even though SCOC was supposed to begin overseeing the State's secure facilities for youths in 1996, it had not promulgated regulations governing their operations and did not begin inspecting the facilities until 2007. It further found that SCOC was not fully meeting its inspection goals for local correctional facilities or handling grievances in a timely manner.

At this time, an issue arose concerning Miller, the presumptive choice for Executive Director. As Miller was a retired state employee, he would require a waiver from the Department of Civil Service in order to receive a salary upon assuming the new position. On February 7, 2008, O'Donnell e-mailed Kavaney that "Francine is aware of the need for a waiver and asked us to pursue it." Later that same day, Kavaney e-mailed James about the waiver issue and further informed James that the Civil Service Commission had a deadline of January 22, 2008, for items to be included for their February 12-13, 2008 meeting.

Although Miller was the presumptive choice for Executive Director, he testified that he was never offered the position and was only informed that he was a potential candidate. He further testified that he was informed that he would be required to undergo a separate interview process for the position, which never occurred.

SCOC Learns of the Effort to Create Executive Director Position

As noted in her December 12, 2007, e-mail to Langley, O'Donnell intended that the Executive Director position be created without informing SCOC Chairman Daniel Stewart or other agency employees. Langley testified that Kavaney told him "at the very beginning" that this was a "confidential matter" not to be shared with SCOC. Kavaney similarly testified that she was specifically instructed either by O'Donnell or James not to involve SCOC in this process.

O'Donnell testified that the creation of the position was a confidential Governor's appointments matter, and that "I didn't feel I had authority to consult [Stewart] about prospective appointments." "It wasn't done to impact the current SCOC leadership,"

O'Donnell stated. Bonacquist also testified that he saw no reason to inform Stewart: "So why would we talk to him? I mean, this is all future planning for a position for a new chair. So in my mind, it would never occur to me to talk to him about this." Kavaney saw an additional reason that SCOC wasn't informed. The agency already had "enough distractions," she testified.

Despite the intent of DCJS officials not to involve the SCOC, information about their efforts to create an Executive Director position inadvertently reached the SCOC on February 5, 2008. This occurred because a Division of the Budget employee working on the proposal had e-mailed one of Langley's staff with a question about the SCOC; while waiting for that person to respond, the Division of the Budget employee contacted SCOC Counsel Michael Donegan for the information. Donegan immediately informed Stewart, who then sought an explanation from O'Donnell.

Several days later, Stewart and O'Donnell spoke by telephone about the matter and also arranged to meet the following week. O'Donnell and Stewart had varying recollections of these discussions. O'Donnell testified while she apologized to Stewart for any embarrassment the situation may have caused him, she "didn't feel that [she] acted inappropriately" because she was not obligated to inform Stewart about what she viewed as a confidential appointments matter. Stewart testified that O'Donnell went further than merely apologizing and characterized her failure to notify Stewart as a "major mistake."

Stewart testified that he considered the actions of DCJS officials in creating the position as exceeding their authority under the hosted agency relationship. "I am to be consulted on anything dealing with human resources in my agency," Stewart said about

the relationship. Significantly, Stewart also suggested that the DCJS officials' actions were inconsistent with the Correction Law. "I am the appointing authority for my agency, no one else can appoint."

Stewart was especially critical of DCJS's use of SCOC letterhead in its request to Civil Service, an action he said he viewed with "complete disbelief" when he first learned of it. Stewart testified that he was unaware that DCJS had ever used SCOC letterhead for any purpose prior to this instance. "It had never come up," Stewart testified. "I wouldn't think anybody would ever overstep that boundary, to be quite honest with you." Further, Stewart testified that he considered DCJS's actions "unethical."

However, the Inspector General determined that DCJS's use of the letterhead of hosted agencies, including the SCOC, had been an accepted practice for a considerable time. Langley, the DCJS Director of Human Resources Management, testified, and all other witnesses concurred, that under the hosted agency relationship he serves as the human resources director for the hosted agencies, including the SCOC, and "when I submit any transactions for any of these agencies, it goes, it always goes out on their letterhead, and I sign my name" Further, Langley testified that this procedure was in use in the office when he was hired in August 2007.

O'Donnell provided a similar account of the use of SCOC letterhead, testifying that, "it has always been done . . . it has been the practice since the agencies have been hosted by DCJS. It certainly was going on well before I became commissioner there." O'Donnell further testified, "I think the [DCJS] personnel people were also the personnel officers for those agencies, that's the way I looked at it. Our personnel director was the

personnel director for SCOC . . . and so when he was acting in that capacity or anyone under him, I felt that they were acting for the agencies using their letterhead.”

Langley’s predecessor as DCJS Director of Human Resources Management, Alyce Ash, agreed, testifying that while at DCJS she was “supposed to” use SCOC letterhead when acting as the SCOC human resources department (including in the hiring of employees) and that it would have been a “mistake” if she used DCJS letterhead in these circumstances. Ashe testified that as the host agency, DCJS “handled the paperwork” for the SCOC and other hosted agencies, but could not “mandate” a hosted agency’s underlying decisions. Instead, DCJS serves to assist the hosted agencies in implementing their human resources determinations. Specifically, Ashe testified that during her tenure, hiring, discipline, or termination decisions were made by officials of the hosted agencies.

The Inspector General requested and obtained from DCJS copies of correspondence signed by Langley on SCOC letterhead, both before and after the December 14, 2007, request to Civil Service to create an Executive Director position at the SCOC. The Inspector General further reviewed documents signed by Langley as Director of Human Resources for other agencies hosted by DCJS.

Notwithstanding the normal practice of using hosted agency letterhead, the December 14, 2007, request appears to have been unique in that it represented a personnel matter that was unknown to the head of the agency on whose letterhead it was sent. Bonacquist acknowledged the unusual nature of the correspondence, testifying, “they probably hadn’t done something like this before, where the SCOC had no

knowledge of it whatsoever.” Kavaney testified, “I wish it hadn’t gone out on their stationery because they didn’t know about it.”

In an attempt to prevent any future use of SCOC letterhead without his knowledge, Stewart on February 8, 2008, sent a memorandum to Langley and Kimberly Szady, DCJS Director of Finance. In the memorandum, Stewart stated:

Please be advised that, effective immediately, prior to you, your employees or your unit signing, executing or submitting any type of administrative document, correspondence, application or request on behalf of the Commission of Correction, you must first submit them for my review and approval.

Kindly acknowledge your receipt of this policy in writing on the enclosed copy and return to my assistant at your earliest convenience. Thanks you for your cooperation in this matter.

After consulting with DCJS Counsel’s Office, neither Langley nor Szady signed the document, and the matter was not pursued further.

Civil Service Approves and Later Rescinds Executive Director Position

Stewart testified that the SCOC did not need and could not afford the Executive Director position. According to Stewart, the addition of the position to the SCOC’s organization would be “a duplication of service of what’s already being accomplished” and make management of the agency more, not less, difficult. Stewart further testified that the Executive Director position, as it was proposed, “usurps the power of the Commission. It takes the chairman’s position and the two commissioners totally out of the loop on day-to-day operations of that agency.” Stewart added, “We do not need top-heavy bureaucrats, we need field staff.” SCOC Counsel Donegan similarly complained of insufficient staffing, noting that the SCOC employed a mere 36 employees.

When asked by the Inspector General if he would have approved the request for an Executive Director if he had been consulted and informed that the Governor's Office considered it "appropriate," Stewart testified, "No, I would have had to have been proven to that there was a necessity for the position." Stewart elaborated:

If they had a concept, the proper thing would be, bring that concept to me, sit me down and prove to me that this is a necessity for this agency, I'll prove to you that it is not. But prove to me that it's a necessity for the agency, and then, if it is, and if we can logistically set it up, then you could probably have my nod, and you'll be approved.

Contrary to his testimony that he would have opposed creation of the Executive Director position, Stewart, in a February 7, 2008 e-mail to State Director of Criminal Justice Michael Balboni, although complaining that DCJS had acted without his "knowledge or consultation," specifically informed Balboni: "Please notice I didn't use the word approval. In the end, what the Governor's office feels is appropriate is what will be implemented. I have no problem with that."⁹

On February 13, 2008, at its monthly meeting, the Civil Service Commission approved the request for the establishment of an Executive Director position at the SCOC in the exempt class. Although, as discussed above, Stewart and Donegan had learned a week prior that the Executive Director matter would be reviewed by the Civil Service Commission on February 12 or 13 and concededly knew they had the ability to appear at the meeting or otherwise voice their objections to the Civil Service Commission, they chose not to appear before the Commission or otherwise inform the Commission of their concerns or objections.

⁹ Although Stewart contacted Balboni, an acquaintance, there is no evidence that Balboni was involved in the creation of the Executive Director position.

No Executive Director appointment was made after February 13, 2008. In a letter to the Civil Service Commission dated May 28, 2008, Stewart requested that the position be eliminated, citing looming fiscal concerns facing the state. Stewart wrote, “as part of our effort to participate in the Governor’s plan of fiscal responsibility, it is appropriate that this item be deleted from the SCOC roster at this time.” In a June 2, 2008 letter to Stewart, the Civil Service Commission advised that it had granted Stewart’s application and withdrawn the request to create the position.

Beilein was nominated as SCOC chair on February 21, 2008 by former Governor Spitzer. Beilein was re-nominated by Governor Paterson and was approved by the state Senate on August 8, 2008. No subsequent request to create an Executive Director position has been made.

ANALYSIS AND FINDINGS

Did DCJS Have the Authority to Create the Executive Director Position?

When filing documents with the Department of Civil Service to create the Executive Director position, Langley acted at the direction of his superiors at DCJS, Kavaney and O’Donnell. Notably, Kavaney and O’Donnell did not merely act in their respective capacities as Deputy Commissioner and Commissioner of DCJS when instructing Langley. Rather, Kavaney and O’Donnell acted under the auspices of the Governor’s Appointments Office.

As discussed above, when the SCOC was separated from the New York State Department of Correctional Services, it was not established as an independent entity distinct from any other branch of state government. To the contrary, the SCOC was

expressly transferred from being contained within one discrete division of the Executive Branch, the Department of Correctional Services, to a stand alone agency “within the executive department”. The Executive Department was designed to be a functional subdivision of the New York State Executive Branch established to serve as the Governor’s administrative department and to assist and carry out duties assigned by him. The New York Court of Appeals has long-held that “[w]ithin our tripartite governmental framework, the Governor, as chief executive officer, has the responsibility to manage the operations of the divisions of the executive branch . . .” Furthermore, under New York State law, the Governor is the “head of the executive department”.

In this instance, the evidence demonstrates that the impetus behind creation of the Executive Director position was the determination that the SCOC lacked effective leadership and was not fulfilling its statutory mandate, as later independently affirmed by the Office of the State Comptroller. The Executive Director position was pursued in order to provide the incoming SCOC Chairman with assistance in reforming the agency to fulfill its mission. While it is not necessary in this report to delineate the limits of the Governor’s authority with respect to agencies and commissions within the Executive Department, a compelling argument exists that the Governor’s Office possesses the authority to create a position within a subordinate division of the Executive Department in order to improve the management and effectiveness of an agency. In fact, when presented with evidence that a body under his auspices is not meeting its statutory obligations, it can be argued that the Governor has a duty to attempt to remedy the problem. Under these circumstances, the DCJS officials did not engage in misconduct in creating the Executive Director position.

It is reasonable to conclude that DCJS, acting under the direction of James, possessed the authority to create the Executive Director position. Although the Inspector General recognizes Kavaney's wish not to disrupt ongoing operations of the SCOC by sharing with it potential organizational changes, the Inspector General also acknowledges Stewart's concerns that DCJS' actions could be viewed as diminishing his authority within his agency. The Inspector General recommends that if this unusual confluence of factors should recur, a better approach would be to delay formal submission of the request to the Civil Service until the new Chairman is confirmed or to advise the then-current Chairman of the intended actions.

Correction Law § 44

Correction Law § 44 states that the Chairman of the SCOC "may appoint such assistants, officers and employees, committees and consultants for the board and the council as he may determine necessary, prescribe their powers and duties, fix their compensation and provide for reimbursement of their expenses within amounts appropriated therefore." DCJS officials interviewed all stated that while they believed that they had the ability to create the new Executive Director title, they recognized that it was the SCOC Chairman who possessed the authority to actually appoint an individual to that position. Although DCJS recommended that Philip Miller be considered for the position, no person was ever appointed to the position nor was any person's salary fixed. Rather, a position with enumerated duties was designated as exempt under the Civil Service Law and approved by the Division of the Budget. If the new Chairman wished to fill this position and set the salary for the person whom he

selected to serve, he would have been required to obtain the Director of the Budget's approval at that time. If the Chairman did not wish to fill this position with these duties, he could simply choose not to seek to appoint anyone; therefore, based upon applicable law, DCJS officials could reasonably believe that these acts did not contravene the Correction Law.¹⁰

Alleged Penal Law Violations

As there exists authority to support the creation of the Executive Director position, Langley, Kavaney and O'Donnell can not be said to have committed misconduct much less be criminally liable for their actions. Nonetheless, as the complainant in this matter made specific allegations of criminal violations, a brief discussion is warranted.

Penal Law § 195.00 provides, in relevant part, that a public servant is guilty of the crime of official misconduct when he or she “with the intent to obtain a benefit or deprive another person of a benefit . . . commits an act relating to his office, but constituting a unauthorized exercise of his official functions, knowing that such act is unauthorized.” Therefore, in order to violate the penal law, the accused must have not only engaged in an unauthorized act, but must have done so “knowingly” with the intent to obtain a benefit. In other words, the person alleged to have committed the crime must not only act to obtain an unauthorized benefit but must know that the alleged act was unauthorized.

¹⁰ It is also notable that while in other subsections of § 44, the Chairman is granted authority in regard to the commission, the board and the council, in the subsection granting him the authority to appoint subordinate officers, he is only granted this power in regard to the two bodies contained within the commission – the board and the council - and not the commission itself. A review of the legislative history of this section does not reveal a clear reason for this omission.

Moreover, the benefit sought must be concrete and personal and an intended “general, societal benefit” is insufficient.

The New York Court of Appeals has held that these provisions are “high barriers” to potential criminal prosecution purposefully designed to “to prevent a criminal court from reviewing mere errors of judgment on the part of public officials.” Acts which are “the product of inadvertence, incompetence, blunder, neglect or dereliction of duty, or any other act, no matter how egregious, that might more properly be considered in a disciplinary rather than a criminal forum” are not criminal under this statute.¹¹

In this matter, all of the officials involved credibly believed that they possessed the authority to take their actions and that these acts were for the public good. Accordingly, they can not be guilty of the crime of official misconduct.

In addition to reasonably acting at the direction of his superiors, the claim that Langley submitted a false instrument for filing by using SCOC letterhead is unfounded. It is beyond dispute, that, as Director of Human Resources Management for DCJS, the host agency of the SCOC, Langley serves as the SCOC’s Director of Human Resources. Therefore, the use of this title on the submissions to the Department of Civil Service was accurate and, by definition, is not a false statement. As Langley was acting under the direction of O’Donnell and Kavaney and had no reason to believe that they lacked the legal ability to direct his submissions, Langley committed no offense.

While Langley did not utilize SCOC letterhead in an effort to defraud, use of SCOC letterhead in this specific circumstance where the head of the agency was unaware of the proceedings was ill-advised. Witnesses both within SCOC and DCJS consistently

¹¹ People v. Feerick, 93 N.Y.2d 433, 448 (1999).

testified that the hosted agency arrangement has never been formalized, but rather has developed as a matter of practice. In order to avoid any future issues or confusion, relevant officials from DCJS and the SCOC should confer and agree on the specifics of their arrangement.

Alleged Ethics Violations

Pursuant to Public Officers Law § 74(3), state employees must abide by a code of ethics. In relevant part:

No officer or employee of a state agency . . . should use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others.

An officer or employee of a state agency . . . employee should not by his conduct give reasonable basis for 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.

An officer or employee of a state agency . . . should endeavor 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.

A state employee who “knowingly and intentionally” violates these provisions is subject to sanctions by the New York State Commission on Public Integrity. In this matter, based upon their believed and apparent authority to create the position and their motivation to ensure that the SCOC was meeting its statutory obligations, the Inspector General does not find that any subject knowingly and intentionally violated any of these provisions.