

# Investigative Report

## U.S. Department of Labor Office of Inspector General



OIG Form 110 (OI-6/08)

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|------------------------------------------------------------|--------------------------------------------------------------------------------------------------|----------------------|-----------------------------|
| <b>Subject</b><br><br><b>EBSA<br/>Management et<br/>al</b> | <b>Violation Character</b><br><br><b>Alleged Abuse<br/>of Authority by<br/>EBSA<br/>Managers</b> | <b>File Number:</b>  | <b>14-2601-0004 IA</b>      |
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|                                                            |                                                                                                  | <b>Reporting SA:</b> | <b>Robert W. Wyche</b>      |
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|                                                            |                                                                                                  | <b>Date</b>          | <b>June 22, 2009</b>        |
|                                                            |                                                                                                  | <b>SA Signature</b>  | <i>[Signature]</i>          |
|                                                            |                                                                                                  | <b>Supervisor</b>    | <i>[Signature]</i>          |

This case originated based on information from William E. Reukauf, Acting Special Counsel, U.S. Office of Special Counsel (OSC), 1730 M Street, N.W., Suite 218, Washington, DC, 20036, telephone 202/254-3600. In a letter addressed to The Honorable Elaine L. Chao, Secretary, U.S. Department of Labor (DOL), Washington, DC, (**Attachment 1**) Mr. Reukauf referred a whistleblower disclosure from a DOL employee identified as Jose Castillo, Auditor, Employee Benefits Security Administration (EBSA), New York, New York. The following allegations made by Mr. Castillo were identified in this letter to Secretary Chao from Mr. Reukauf:

1. Mr. Castillo, during an investigation in November 2005, identified that the Asbestos Workers Local 12 Annuity Fund had been defrauded in the amount of \$1.8 million and alleged that when he attempted to review his findings with his "special supervisor" Robert Goldberg, EBSA New York Regional Office (RO), DOL, Mr. Goldberg refused to review any of the information.
2. Nichelle Langone, Senior Investigator, EBSA, New York RO, DOL replaced Mr. Goldberg as Mr. Castillo's acting supervisor in February 2006; however, Mr. Goldberg remained as Mr. Castillo's "special supervisor" in the Asbestos Workers Local 12 Funds investigation. Mr. Castillo alleges that in his ten years at EBSA, he has never seen a "special supervisor" appointed for any other cases.
3. In April 2006, Jeffrey Gaynor, Deputy Director, EBSA, New York RO, DOL, refused to review Mr. Castillo's investigative data from the Asbestos Workers Local 12 Funds investigation, after it sat on his desk for a week and a half.
4. In November 2006, Jonathan Kay, Regional Director, EBSA, New York RO instructed Mr. Castillo not to discuss the Asbestos Workers Local 12 Funds investigation with anyone other than his supervisors, Mr. Goldberg or Deputy Director Gaynor. Mr. Castillo was also instructed by Regional Director Kay not to contact any Asbestos Workers Local 12 Union attorneys, third party administrators or fund participants without the approval of Deputy Director Gaynor or Mr. Goldberg. Mr. Castillo alleges he has never been restricted from contacting similar parties in other investigations.

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5. In November 2006, Mr. Castillo identified that \$381,000 of the Asbestos Workers Local 12 Annuity Fund had been improperly used as employer contributions and alleges this is a prohibited transaction in violation of Employee Retirement Income Security Act (ERISA) Section 404 and 406.
6. Mr. Castillo alleges that Regional Director Kay and Mr. Goldberg impeded his discovery of the \$381,000 in the Asbestos Workers Local 12 Annuity Funds, which was used as employer contributions by refusing to examine his evidence and thus allowing the criminal statute of limitations to expire.
7. Mr. Castillo briefed Michael Briglia, Senior Investigator, EBSA, New York RO on his investigative findings in the Asbestos Workers Local 12 Funds investigation. Mr. Briglia was Mr. Castillo's acting supervisor for several weeks in calendar year (CY) 2007, while Ms. Langone was out of town. Mr. Castillo alleges that Mr. Briglia initially agreed that there appeared to be criminal violations in the Asbestos Workers Local 12 Funds investigation but contacted him the next day and told Mr. Castillo never to speak to him again regarding this investigation.

### **Investigative Summary**

This investigation has concluded that all seven of Mr. Castillo's allegations to OSC regarding abuses of authority by EBSA managers, et al. are unsubstantiated. Interviews were conducted with Mr. Castillo's supervisors and co-workers at EBSA, New York RO, officials from EBSA's National Office to include the Office of the Chief Accountant, DOL, Washington, DC and attorneys and the regional solicitor of labor, Solicitor's Office, EBSA, New York RO. None of these interviews produced information or evidence lending merit to the allegations that employees at DOL have abused their authority by obstructing or attempting to delay the Asbestos Workers Local 12 Funds investigation as claimed by Mr. Castillo.

Personal interviews with Mr. Castillo revealed conflicting information and factual data with respect to the individuals named by Mr. Castillo in his allegations and Mr. Castillo's investigative findings in the Asbestos Workers Local 12 Funds investigation. Mr. Castillo often provided only partial information that would best support his claims.

This investigation did reveal delays in the Asbestos Workers Local 12 Funds investigation that were attributed to the inexperience of EBSA New York RO managers. This investigation determined that these delays were not intentional delays intended to obstruct or delay Mr. Castillo's investigation. In addition, a review of Mr. Castillo's investigative findings by SOL, EBSA, New York RO and OCA, DOL, Washington, DC, confirmed the investigative issues identified by Mr. Castillo in the Asbestos Workers Local 12 Funds investigation did not contain any criminal violations.

This report will first summarize Mr. Castillo's investigation timeline involving the Asbestos Workers Local 12 Annuity Fund. This report will then address each of the seven specific allegations made by Mr. Castillo, which were outlined by Acting Special Counsel Reukauf in his letter to Secretary Chao, dated January 9, 2009. This report will then address additional allegations made by Mr. Castillo during his interviews in this investigation.

## Mr. Castillo's Asbestos Workers Local 12 Funds Investigative Summary and Timeline

Mr. Castillo provided the following investigative summary and timeline during his interview with AIG Cunningham and me on April 7, 2009 (**Attachment 2**).

### February 2002

Mr. Castillo was first assigned the Asbestos Workers Local 12 Funds investigation by his supervisor Jonathan Brown, Supervisory Investigator (retired), EBSA, New York RO, DOL.

### May 3, 2005

Mr. Castillo sent a voluntary compliance (VC) letter to the Asbestos Workers Local 12 Union trustees to initiate a settlement in the investigation (**Attachment 3**).

### October 2005

Mr. Goldberg was appointed as Mr. Castillo's acting supervisor after the retirement of Mr. Brown. This assignment was part of a rotational acting supervisor assignment implemented by Regional Director Kay until a permanent replacement was named for Mr. Brown.

### November 2005

Mr. Castillo received a letter from Mr. [redacted] Asbestos Workers Local 12 Union member (retired) alleging he was "shortchanged" on his year 2000 investment earnings (**Attachment 4**). In reviewing this letter, Mr. Castillo identified \$1.8 million in the Asbestos Workers Local 12 Annuity Funds year 2000 earnings that was not allocated to the Annuity Fund's participants.

Mr. Castillo met with his acting supervisor Mr. Goldberg and told him it looked like the Asbestos Workers Local 12 Annuity Fund had been "hijacked" and that the union accountants were lying by reporting a shortfall in the Annuity Fund. Mr. Castillo reported that Mr. Goldberg made no response and just walked away from him.

### November 7, 2005

The first settlement meeting was held between EBSA New York RO and the Asbestos Workers Local 12 Union trustees, accountants and attorneys.



- Mr. Goldberg refused to look at Mr. Castillo's documents prior to the settlement meeting, which according to Mr. Castillo, proved a criminal violation existed.
- Mr. Goldberg questioned the validity of the issues presented in the VC letter by Mr. Castillo and refused to address the alleged criminal issues.

January 9, 2006

The second settlement meeting was held between EBSA New York RO and the Asbestos Workers Local 12 Union trustees, accountants and attorneys.

- Mr. Goldberg wanted to eliminate all of the accounting issues in the VC letter due to a lack of solid evidence.

January 30, 2006

The third settlement meeting was held between EBSA New York RO and the Asbestos Workers Local 12 Union trustees, accountants and attorneys.

- Mr. Goldberg was still questioning the validity of Mr. Castillo's investigative findings.

February 1, 2006

Ms. Langone, Mr. Goldberg as Mr. Castillo's acting supervisor. Regional Director Kay kept Mr. Goldberg as Mr. Castillo's supervisor on the Asbestos Workers Local 12 Funds investigation.

March 31, 2006

Mr. Castillo met with Regional Director Kay and voiced complaints about keeping Mr. Goldberg as his supervisor on the Asbestos Workers Local 12 Funds investigation.

- Mr. Castillo also complained during this meeting that Mr. Goldberg made facial gestures behind his back during a settlement meeting.

April 11, 2006

Regional Director Kay instructed former Deputy Director Gaynor to become involved in the Asbestos Workers Local 12 Funds investigation. Mr. Castillo gave former Deputy Director Gaynor all of his documents relating to the Asbestos Workers Local 12 Funds

investigation but claims former Deputy Director Gaynor never reviewed them.

June 14, 2006

Mr. Castillo met with James Heinzman, CPA, Schultheis and Panettieri, the accounting firm representing the Asbestos Workers Local 12 Union, to discuss the VC letter.

October 2006

Mr. Castillo identified \$381,000 in the Asbestos Workers Local 12 Union Annuity Fund that he alleged was used as employer contributions instead of going to the Annuity Fund participants.

- Mr. Castillo confirmed that the criminal statute of limitations associated with this violation had already expired prior to Mr. Castillo discovering the suspected violation.

November 3, 2006

Mr. Castillo met with Mr. Heinzman, to again discuss issues identified in the VC letter.

November 2006

Mr. Castillo received an e-mail from Regional Director Kay (**Attachment 5**) advising him not to contact anyone involved in the Asbestos Workers Local 12 Funds investigation without approval from Mr. Goldberg or former Deputy Director Gaynor.

January 2007

Mr. Castillo reviewed the Asbestos Workers Local 12 Funds investigation with his temporary supervisor, Mr. Briglia. Mr. Briglia was temporarily appointed as acting supervisor for a short period of time, while Ms. Langone was out of the office. Mr. Castillo stated Mr. Briglia agreed with his investigative findings and also felt that criminal violations existed. Mr. Castillo stated that Mr. Briglia spoke with him the next day and told him he could not discuss the Asbestos Workers Local 12 Funds investigation with him anymore.

March 6, 2007

Mr. Castillo met with Mr. Heinzman, and discussed Mr. Castillo's claim that \$381,000 in the Asbestos Workers Local 12 Union Annuity Fund had been used as employer contributions instead of going to the Annuity Fund participants.

May 4, 2007

Mr. Castillo submitted his Report of Investigation (ROI) for Part 1 of the Asbestos Workers Local 12 Funds investigation (**Attachment 6**) to the Office of the Solicitor (SOL), EBSA, New York Region, DOL. Regional Director Kay made the decision to divide the Asbestos Workers Local 12 Funds investigation into two parts; Part 1 consisting of civil issues and Part 2 consisting of four remaining issues in the investigation, which were still unresolved at this time by EBSA and SOL.

September 2007

Jeffrey Monhart, Chief, Division of Field Operations, Office of Enforcement, EBSA, DOL, Washington, DC, was temporarily detailed to EBSA New York RO as the Acting Deputy Director after Deputy Director Gaynor retired.

- Mr. Castillo advised that Acting Deputy Director Monhart wanted him to obtain a deposition from Mr. Heinzman; however, Regional Director Kay directed him to conduct a telephonic interview with Mr. Heinzman instead. The purpose of the interview was to determine the accounting firm Schultheis and Panettieri's position on the issues in Part 2 of the Asbestos Workers Local 12 Funds investigation.

December 3, 2007

Mr. Castillo submitted the ROI for Part 2 of the Asbestos Workers Local 12 Funds investigation (**Attachment 7**) to SOL, which contained the following four issues identified by Mr. Castillo:

1. During the 2000 to 2001 plan year, approximately \$381,000 in Asbestos Workers Annuity Fund earnings was paid out of the Fund without documentation or written explanation. Mr. Castillo alleged that the \$381,000 of the Asbestos Workers Local 12 Annuity Fund's investment earnings was used by the Asbestos Workers Local 12 plan administrator as employer contributions instead of being allocated to the fund participants.

2. The Asbestos Workers Local 12 Annuity Fund's earnings for CY 2000 (totaling approximately \$1.8 million) were not allocated to individual participant accounts, even though the Annuity Fund appears to have had more than sufficient assets to cover all participant account balances and to meet its other obligations.
3. Employer contributions forwarded to the Asbestos Workers Local 12 Annuity Fund investment account in three separate transactions on October 19, 2001, January 28, 2002 and May 2, 2002 may have been insufficient to cover the amounts due, according to the remittance reports for the corresponding period of time.
4. In three separate transactions on June 6, 2001, November 20, 2001 and January 8, 2002, a total of approximately \$1.2 million in Asbestos Workers Local 12 Welfare Plan assets was transferred to the Asbestos Workers Local 12 Annuity Fund without sufficient documentation or explanation.

#### January 24, 2008

Mr. Castillo first met with Jennifer Weekley, Attorney, SOL, New York RO, to discuss Part 2 of the Asbestos Workers Local 12 Funds investigation. Mr. Castillo reported that Ms. Weekley did not agree with all of his investigative findings regarding Part 2 of the Asbestos Workers Local 12 Funds investigation.

#### April 2008

A settlement was reached between EBSA, SOL and the Asbestos Workers Local 12 Union for Part 1 of the Asbestos Workers Local 12 Funds investigation. Regional Director Kay solicited an opinion from the Office of Regulation and Interpretation (ORI), DOL, Washington, DC regarding issues one and two of Part 2 of the Asbestos Workers Local 12 Funds investigation.

#### May 2008

Mr. Castillo was excluded from a meeting at SOL by Patricia Rodenhausen, Regional Solicitor of Labor (RSOL), New York Region, DOL. This meeting was attended by EBSA managers, SOL attorneys and accountants, lawyers and trustees representing the Asbestos Workers Local 12 Union.

July 31, 2008

Mr. Castillo was excluded from another meeting at SOL to discuss issues in Part 2 of the Asbestos Workers Local 12 Funds investigation.

December 2008

In an attempt to resolve issue one of Part 2 of the Asbestos Workers Local 12 Funds investigation, Regional Director Kay asked the Office of the Chief Accountant (OCA), EBSA, DOL, Washington, DC to render an opinion as to whether loan receivables are considered planned assets.

### OSC Allegation 1

Mr. Castillo, during an investigation in November 2005, identified that the Asbestos Workers Local 12 Annuity Fund had been defrauded in the amount of \$1.8 million and alleged that when he attempted to review his findings with his "special supervisor" Robert Goldberg, EBSA New York Regional Office (RO), DOL, Mr. Goldberg refused to review any of the information.

### Investigative Findings

On February 12, 2009, Asa Cunningham, Assistant Inspector General (AIG), Office of Inspection and Special Investigations, Office of Inspector General, DOL, and I interviewed Mr. Goldberg and requested a written sworn statement (**Attachment 8**) at EBSA, New York RO. Mr. Goldberg advised that shortly after being assigned as Mr. Castillo's acting supervisor in October 2005, Mr. Castillo approached him and advised him of a case he was working known as the Asbestos Workers Local 12 Funds investigation. Mr. Goldberg stated that Mr. Castillo informed him of an upcoming meeting scheduled with the Asbestos Workers Local 12 Union trustees to discuss the issues identified in his investigation. Mr. Goldberg reported that Mr. Castillo told him that the Asbestos Workers Local 12 Union had already agreed to settle all of the issues he identified in the investigation.

Mr. Goldberg advised that his supervisor at the time, former Deputy Director Gaynor wanted to have a meeting to review Mr. Castillo's investigative issues in the Asbestos Workers Local 12 Funds investigation prior to the meeting with the Asbestos Workers Local 12 Union.

After reviewing the files that Mr. Castillo had brought to the meeting, Mr. Goldberg indicated that Deputy Director Gaynor was unclear as if any violations actually existed for some of the issues identified by Mr. Castillo. Mr. Goldberg stated that Mr. Castillo became upset during this meeting and stated that Deputy Director Gaynor and Mr. Goldberg did not understand the issues because they had trouble understanding his English. According to Mr. Goldberg, Deputy Director Gaynor then made the comment that it was a good thing the Asbestos Workers Local 12 Union agreed to the issues because he doubted if any violations existed.

Mr. Goldberg reported he attended three settlement meetings within a two to three month time period with Mr. Castillo and the Asbestos Workers Union Local 12 trustees, accountants and attorneys. Mr. Goldberg was surprised at the first meeting, during which he was informed by Denis Engel, Esq., counsel for the Asbestos Workers Local 12 Union that they were not in agreement with any of Mr. Castillo's findings. Mr. Goldberg felt unprepared at the meeting because Mr. Castillo had provided him with very little information about the case. Mr. Goldberg further reported that each time an issue was argued by the representatives of the Asbestos Workers Local 12 Union, Mr. Castillo failed to respond or defend his findings.

According to Mr. Goldberg, prior to each settlement meeting, he asked Mr. Castillo to provide him updated information pertaining to his investigation. Mr. Goldberg felt Mr. Castillo was holding back information relating to the investigation and was not forthcoming with all of the related documentation. He expressed frustration that he was not being thoroughly briefed by Mr. Castillo and that Mr. Castillo failed to interject any support of his investigative findings during the meetings. Mr. Goldberg reported that Mr. Castillo was not properly prepared for these meetings.

Mr. Goldberg stated that he personally ran each meeting with the Asbestos Workers Local 12 Union and that Mr. Castillo was of no help to him during these meetings. Mr. Goldberg stated that Mr. Castillo insufficiently briefed him, which caused Mr. Goldberg embarrassment and "negatively reflected DOL's professionalism."

Mr. Goldberg stated that after the ROI for Part 1 of the Asbestos Workers Local 12 Funds investigation was prepared and submitted by Mr. Castillo and once SOL had become involved, Mr. Castillo never voiced any concerns or objections. Mr. Castillo was also in full agreement with the settlement reached between EBSA, SOL and the Asbestos Workers Local 12 Union.

According to Mr. Goldberg, after the ROI had been completed by Mr. Castillo, his working relationship with Mr. Castillo deteriorated. Each meeting with Mr. Castillo became more confrontational. Each time Mr. Goldberg would request documents from Mr. Castillo relating to the investigation, Mr. Castillo would question his request and demand to know what he was going to do with the documents.

On February 12, 2009, AIG Cunningham and I interviewed Regional Director Kay and requested a written sworn statement at, EBSA, New York RO (**Attachment 9**). Regional Director Kay stated that Mr. Goldberg had complained to him that Mr. Castillo was not forthcoming with information prior to the first settlement meeting between EBSA and the Asbestos Workers Local 12 Union trustees, attorneys and accountants. Mr. Goldberg also reported to Deputy Director Kay that Mr. Castillo was non-responsive to questions directed at him by Mr. Goldberg and union trustees during the meeting and that when Mr. Castillo did speak he contradicted himself with incorrect facts. Regional Director Kay also received similar complaints from Mr. Goldberg referencing several other settlement meetings involving Mr. Castillo, during which, Mr. Castillo's account of investigative activities differed from what he had previously told Mr. Goldberg.

### **OSC Allegation 1 Conclusion**

This investigation revealed the allegation by Mr. Castillo that Mr. Goldberg failed to review documents related to the Asbestos Workers Local 12 Funds investigation is unsubstantiated.

Interviews with Mr. Goldberg and Deputy Director Kay determined that Mr. Goldberg asked Mr. Castillo on numerous occasions to provide information and documents related to the Asbestos Workers Local 12 Funds investigation. Mr. Castillo only provided partial information when requested and seemed to provide only the information that would back-up his investigative findings. The lack of documentation provided by Mr. Castillo was further substantiated during the settlement meetings when union representatives confronted Mr. Goldberg with issues that he had not previously been briefed on by Mr. Castillo.

### **OSC Allegation 2**

Nichelle Langone, Senior Investigator, EBSA, New York RO, DOL replaced Mr. Goldberg as Mr. Castillo's acting supervisor in February 2006; however, Mr. Goldberg remained as Mr. Castillo's "special supervisor" in the Asbestos Workers Local 12 Funds investigation. Mr. Castillo alleges that in his ten years at EBSA, he has never seen a "special supervisor" appointed for any other cases.

### **Investigative Findings**

On March 11, 2009, AIG Cunningham and I interviewed Ms. Langone and requested a written sworn statement at EBSA, New York RO (**Attachment 10**). Ms. Langone advised that in February 2006 she was given the assignment of acting supervisor and replaced Mr. Goldberg, (then acting supervisor) EBSA, New York RO. Ms. Langone reported that during this time period, Regional Director Kay implemented rotational management assignments in an attempt to observe various senior EBSA employees in an acting management capacity prior to making a permanent selection for an open position of supervisory investigator.

Prior to her assignment as acting group supervisor, Mr. Goldberg had been supervising Mr. Castillo during his investigation of the Asbestos Workers Local 12 Funds investigation. Ms. Langone was informed by Regional Director Kay that Mr. Goldberg would continue to supervise Mr. Castillo with respect to the Asbestos Workers Local 12 Funds investigation due to his familiarity with the investigation and his accounting background. Ms. Langone advised she was an attorney and due to the complex accounting issues involved with the Asbestos Workers Local 12 Funds investigation, Regional Director Kay decided that Mr. Goldberg would continue with the supervision of this investigation. Regional Director Kay advised Ms. Langone that she would have supervisory oversight of Mr. Castillo's other EBSA investigations.

During the interview with Mr. Goldberg on February 12, 2009 (**Attachment 8**), Mr. Goldberg advised that in late 2005, he was assigned as an acting manager in the EBSA New York RO, which put Mr. Castillo under his supervision. During this time period, Regional Director Kay implemented rotational management assignments for EBSA supervisors in an attempt to



observe various senior employees in an acting management capacity prior to making a permanent selection for the open position of supervisory investigator. Mr. Goldberg reported that in early CY 2006, Ms. Langone replaced him as acting supervisor; however, Regional Director Kay kept him as Mr. Castillo's supervisor over the Asbestos Workers Local 12 Funds investigation due his familiarity with the case and his accounting background.

During the interview with Regional Director Kay on February 12, 2009 (**Attachment 9**), he advised that after group supervisor Jonathan Brown retired, he established a rotational acting group supervisor position to evaluate several senior EBSA investigators prior to selecting a replacement for Mr. Brown. Mr. Goldberg was given the first acting group supervisor assignment becoming Mr. Castillo's immediate supervisor.

Approximately three or four months later, Ms. Langone replaced Mr. Goldberg as Mr. Castillo's immediate acting group supervisor. According to Regional Director Kay, he made the decision to keep Mr. Goldberg as Mr. Castillo's supervisor on matters pertaining to the Asbestos Workers Local 12 Fund investigation and Ms. Langone as his acting supervisor for all other investigative areas due to the following reasons:

- The investigation involved issues regarding how accountants conduct their audits and bill for their services.
- The investigation required interpretation of various financial statements and relevant accounting principals compiled by the Asbestos Workers Local 12 Union accountants.
- Ms. Langone was an attorney with no accounting background.
- Mr. Goldberg was an accountant and instructor at EBSA's national accounting course.
- Mr. Goldberg was already involved and familiar with the investigation.

Mr. Castillo raised concerns to Regional Director Kay about his decision to have two supervisors assigned to him and expressed his belief that this was an effort to undermine the Asbestos Workers Local 12 Funds investigation. Regional Director Kay maintained that this decision was fully justified to maintain the continuity of the managerial oversight of the Asbestos Workers Local 12 Funds investigation and in no way was made to undermine the investigation.

### **OSC Allegation 2 Conclusion**

This investigation revealed the allegation by Mr. Castillo that he has never seen “special supervisors” assigned to EBSA cases may be supported but has no programmatic or related impact and cannot be characterized as an “abuse of authority.” Interviews with two of Mr. Castillo’s prior acting supervisors, Mr. Goldberg and Ms. Langone and Regional Director Kay determined the decision to maintain Mr. Goldberg as Mr. Castillo’s supervisor for the Asbestos Workers Local 12 Funds investigation, was a management decision made by Regional Director Kay. Although Mr. Castillo may have never experienced a situation during which he reported to two different supervisors, the decision was made by Regional Director Kay in order to maintain managerial continuity with the investigation.

Regional Director Kay outlined specific managerial requirements of the Asbestos Workers Local 12 Funds investigation, which he concluded, required oversight by someone with a strong accounting background. Regional Director Kay further made the decision to keep Mr. Goldberg assigned to the Asbestos Workers Local 12 Funds investigation due to his accounting background and familiarity with the investigation.

### **OSC Allegation 3**

In April 2006, Jeffrey Gaynor, Deputy Director, EBSA, New York RO, DOL, refused to review Mr. Castillo’s investigative data from the Asbestos Workers Local 12 Funds investigation, after it sat on his desk for a week and a half.

### **Investigative Findings**

On May 5, 2009, I telephonically interviewed Jeffrey Gaynor, former Deputy Director (retired), EBSA, New York RO, DOL (**Attachment 11**). Mr. Gaynor advised he had retired from EBSA on April 30, 2007. Mr. Gaynor was unable to recall any information regarding the Asbestos Workers Local 12 Funds investigation and stated he remembered the name Jose Castillo, but had no recollection of him in connection with the Asbestos Workers Local 12 Funds investigation. Further, even if the data sat on Mr. Gaynor’s desk for that period of time, this would not constitute an “abuse of authority” or other misconduct, in the absence of additional facts.

### **OSC Allegation 3 Conclusion**

Mr. Castillo’s allegation that former Deputy Director Gaynor, EBSA, New York RO refused to review the investigative data from the Asbestos Workers Local 12 Funds investigation could not be substantiated. Mr. Gaynor was interviewed and had no recollection of the Asbestos Workers Local 12 Funds investigation. Mr. Gaynor did recall the name Jose Castillo;

however, was unable to associate Mr. Castillo with the Asbestos Workers Local 12 Funds investigation.

#### **OSC Allegation 4**

In November 2006, Regional Director Kay instructed Mr. Castillo not to discuss the Asbestos Workers Local 12 Funds investigation with anyone other than Mr. Goldberg or Regional Director Kay. Mr. Castillo was also instructed by Regional Director Kay not to contact any Asbestos Workers Local 12 Union attorneys, third party administrators or fund participants without the approval of Deputy Director Gaynor or Mr. Goldberg. Mr. Castillo alleges he has never been restricted from contacting similar parties in other investigations.

#### **Investigative Findings**

In November 2006, Regional Director Kay sent an e-mail to Mr. Castillo (**Attachment 5**) advising him of the following:

- “Do not initiate contact with anyone in the Office of Enforcement, Mr. Lebowitz’s office or Brad Campbell’s office regarding your views/issues in this case.”
- “Do not contact Mr. \_\_\_\_\_ without prior approval from Group Supervisor Robert Goldberg or Deputy Regional Director Jeff Gaynor.”
- “Do not contact representatives of the Local 12 Funds, including their counsel and accountants, without prior approval from Group Supervisor Robert Goldberg or Deputy Regional Director Jeff Gaynor.”

During the interview with Regional Director Kay on February 12, 2009 (**Attachment 9**) he expressed concern that Mr. Castillo had been communicating and sharing information with DOL officials and Asbestos Workers Local 12 Union representatives outside the scope of his authority as an EBSA investigator.

During the interview with Mr. Goldberg on February 12, 2009 (**Attachment 8**), Mr. Goldberg revealed that during Mr. Castillo’s investigation of the Asbestos Workers Local 12 Funds investigation, he continued to discuss the confidential details of the investigation with the union participants. According to Mr. Goldberg, it is against EBSA policy to discuss an investigation with the complainants. Mr. Goldberg advised that Regional Director Kay sent Mr. Castillo an e-mail advising him not to contact the union participants to discuss the investigation.

On April 28, 2009, AIG Cunningham and I interviewed Virginia C. Smith, Director of Enforcement, Office of Enforcement, EBSA, DOL, Washington, DC and requested a written sworn statement (**Attachment 12**). Director Smith first became aware of Mr. Castillo's allegations and complaints as a result of e-mails he was sending and carbon copying during the course of his investigation, to high level EBSA officials and individuals outside of EBSA. While reviewing these e-mails and their attachments, Director Smith noticed that Mr. Castillo was providing these individuals confidential information relating to the investigation, which is against EBSA policy.

Director Smith further revealed that it was feared Mr. Castillo was providing Mr. and other former Asbestos Workers Local 12 Union employees with confidential investigative material. In addition, it was believed that Mr. Castillo was also discussing settlement issues with Asbestos Workers Local 12 union trustees outside the scope of his authority as a EBSA investigator. Director Smith contacted Regional Director Kay and advised him to inform Mr. Castillo to discontinue this practice.

#### **OSC Allegation 4 Conclusion**

Mr. Castillo's allegation that Regional Director Kay instructed him not to discuss the Asbestos Workers Local 12 Funds investigation with anyone was substantiated. Regional Director Kay did send Mr. Castillo an e-mail on November 7, 2006 advising him not to contact anyone associated with the Asbestos Workers Local 12 Funds investigation without approval from his supervisors Mr. Goldberg and Deputy Director Gaynor.

However, Mr. Castillo's attempt to infer from this allegation that Regional Director Kay's purpose was to interfere and restrict Mr. Castillo's ability to proceed with his investigation is unfounded. Interviews with Director Smith, Regional Director Kay and Mr. Goldberg confirmed the purpose of Regional Director Kay's e-mail was to keep Mr. Castillo's actions within his scope of authority as an EBSA investigator and to inform Mr. Castillo of any potential violations of EBSA policy. This would not constitute an "abuse of authority" or other misconduct in the absence of additional facts.

#### **OSC Allegations 5 and 6**

In November 2006, Mr. Castillo identified that \$381,000 of the Asbestos Workers Local 12 Annuity Fund had been improperly used as employer contributions and alleges this is a prohibited transaction in violation of Employee Retirement Income Security Act (ERISA) Section 404 and 406.

Mr. Castillo alleges that Regional Director Kay and Mr. Goldberg impeded his discovery of the \$381,000 in the Asbestos Workers Local 12 Annuity Funds, which was used as employer

contributions by refusing to examine his evidence and thus allowing the criminal statute of limitations to expire.

### **Investigative Findings**

On February 12 and 13, 2009, AIG Cunningham and I interviewed Mr. Castillo at EBSA, New York RO (**Attachment 2**). During this interview, Mr. Castillo discussed three occasions; June 14, 2006, November 3, 2006 and March 6, 2007, that at the direction of Regional Director Kay, he (Castillo) met with James Heinzman, CPA, of Schultheis and Panettieri, the accounting firm representing the Asbestos Workers Local 12 Union. The purpose of these meetings was to present and discuss Mr. Castillo's findings that \$381,000 of the Asbestos Workers Local 12 Annuity Fund's investment earnings were used by the Asbestos Workers Local 12 Union plan administrator as employer contributions instead of being allocated to the Annuity Fund participants. According to Mr. Castillo, Mr. Goldberg was also present at these meetings.

Mr. Castillo alleges these meetings were "unnecessary," a "waste of time" and a "delay tactic" by Regional Director Kay. Mr. Castillo further claimed that Mr. Heinzman failed to provide documentation during these meetings to dispute his (Castillo's) investigative findings. Mr. Castillo also expressed frustration due to the fact that both Mr. Goldberg and Deputy Director Gaynor disagreed with his assessments and felt the Asbestos Workers Local 12 Plan Document does allow for investment earnings to be used as employer contributions. Mr. Castillo alleges there is no such thing as a Plan Document that involves this type of transaction.

It should be noted that during this interview with Mr. Castillo, he failed to mention he had not discovered \$381,000 in employer contributions until November 2006, giving the initial impression that this issue was discussed at all three meetings with Mr. Heinzman. Mr. Castillo also gave the impression that Regional Director Kay and Mr. Goldman were aware of the issue involving the \$381,000 prior to November 2006 and refused to proceed with a criminal investigation, even though the criminal statute of limitations had already expired.

On March 12, 2009, AIG Cunningham and I conducted another interview of Mr. Castillo at EBSA, New York RO (**Attachment 14**). During this interview Mr. Castillo admitted the above issue was only discussed during the November 3, 2006 and March 6, 2007 meeting with Mr. Heinzman and was not discussed during the June 14, 2006 meeting. Mr. Castillo also admitted that by the time he had discovered the \$381,000 in employee contributions, the criminal statute of limitations had expired.

Also during the March 12, 2009 interview with Mr. Castillo, he discussed his discovery that \$1.8 million of investment earnings were never allocated to the Asbestos Workers Local 12 funds participants. Mr. Castillo referenced the Asbestos Workers Local 12 Annuity Fund "Notes to Financial Statement Year ending December 31, 2000," which stated "no earnings were allocated for the year ending December 31, 2000." Mr. Castillo claimed this is an admission by the Asbestos Workers Local 12 Union trustees of a criminal violation of the law. Mr. Castillo alleges that he discovered this violation in November 2005, which had originally occurred in September 2001 and at that time, was still within the criminal statute of limitations.

During this same interview with Mr. Castillo, he referred to the above issue involving the \$1.8 million as a potential civil violation and not a criminal violation. When asked why he was now referring to this as a civil violation, Mr. Castillo stated he never described the non-allocation of \$1.8 million to the Annuity Fund participant earnings as a criminal violation.

Segments of Mr. Castillo's statements from the investigative notes were read back to Mr. Castillo and he again denied claiming the issue was a criminal violation. Mr. Castillo's statements now conflicted with his earlier statements made during this interview and each time this was brought to his attention, he responded that AIG Cunningham and I were confused and did not understand the issues.

Mr. Castillo subsequently admitted the issue involving the \$1.8 million initially occurred on October 19, 2001, which had already passed the criminal statute of limitations prior to its discovery. This issue, according to Mr. Castillo, was being pursued by EBSA as a potential civil violation and not a criminal violation.

During another interview with Mr. Castillo on April 7, 2009, (**Attachment 2**), Mr. Castillo admitted that he never discussed with Regional Director Kay that the Asbestos Workers Local 12 Funds investigation possibly contained criminal violations. Mr. Castillo's reason was that it was EBSA's protocol to discuss investigative matters with ones' immediate supervisor, which in this case was Mr. Goldberg.

In describing the progression of the Asbestos Workers Local 12 Funds investigation, Mr. Castillo advised during this interview he was allowed to submit the Asbestos Workers Local 12 Funds ROI on May 4, 2007. It was at this time he stated Regional Director Kay decided to exclude, for the time being, the issue that \$381,000 of the Asbestos Workers Local 12 Annuity Fund's investment earnings were used by the Asbestos Workers Local 12 Plan Administrator as employer contributions instead of being allocated to the Annuity Fund participants. Mr. Castillo indicated that Regional Director Kay and Mr. Goldberg told him he needed more information and proof before

EBSA could proceed in presenting this issue in addition to other issues identified but not proven by Mr. Castillo to the New York RO SOL.

Mr. Castillo advised during this interview that Regional Director Kay divided the Asbestos Workers Local 12 Funds investigation into Part 1 and Part 2, the later addressing the investment earnings and employer contributions. Part 1 of the Asbestos Workers Local 12 Funds investigation was forwarded to SOL, New York RO in May 2007 and was assigned to SOL Attorney Jennifer Weekley.

In October, 2007, SOL, New York RO was authorized by the U.S. Department of Justice, Washington, DC to file a civil case against the Asbestos Workers Local 12 Union trustees based on the information from Part 1 of the Asbestos Workers Local 12 Funds ROI. A settlement meeting was held on December 7, 2007, which was attended by Mr. Castillo, Mr. Goldberg, Ms. Weekley and counsel for the Asbestos Workers Local 12 Union, during which they agreed to a settlement, which was signed on April 17, 2008. As a result of this settlement, all civil action pertaining to Part 1 of the Asbestos Workers Local 12 Funds investigation was dropped.

During this interview, Mr. Castillo identified the following four unresolved suspected violations of the fiduciary provisions of Title I of ERISA in Part 2 of the Asbestos Workers Local 12 Funds investigation:

1. During the 2000 to 2001 plan year, approximately \$381,000 in Asbestos Workers Annuity Fund earnings was paid out of the Fund without documentation or written explanation. Mr. Castillo further alleges that the \$381,000 of the Asbestos Workers Local 12 Annuity Fund's investment earnings was used by the Asbestos Workers Local 12 Plan Administrator as employer contributions instead of being allocated to the fund participants.
2. The Asbestos Workers Local 12 Annuity Fund's earnings for CY 2000 (totaling approximately \$1.8 million) were not allocated to individual participant accounts, even though the Annuity Fund appears to have had more than sufficient assets to cover all participant account balances and to meet its other obligations.
3. Employer contributions forwarded to the Asbestos Workers Local 12 Annuity Fund investment account in three separate transactions on October 19, 2001, January 28, 2002 and May 2, 2002 may have been insufficient to cover the amounts due according to the remittance reports for the corresponding period of time.

4. In three separate transactions on June 6, 2001, November 20, 2001 and January 8, 2002, a total of approximately \$1,237,000 in Asbestos Workers Local 12 Welfare Plan assets was transferred to the Asbestos Workers Local 12 Annuity Fund without sufficient documentation or explanation.

After various meetings with SOL, New York RO to discuss the unresolved investigative issues in Part 2 of the Asbestos Workers Local 12 Funds investigation, Mr. Castillo stated Regional Director Kay decided to solicit information from the "Office of Exemption," DOL, Washington, DC in an attempt to interpret his (Castillo's) investigative findings relating to issue three. Mr. Castillo reported that Regional Director Kay drafted an e-mail, which he copied to Mr. Castillo, addressed to Chief Monhart, Office of Enforcement, EBSA, DOL, Washington, DC (**Attachment 15**). This e-mail, according to Mr. Castillo, requested Chief Monhart to ask the Office of Exemption if they could exempt the Asbestos Workers Local 12 Plan Administrators actions of using the Annuity Fund's investment earnings as employer contributions. Mr. Castillo could not confirm if this e-mail was actually sent by Regional Director Kay since the copy he received was a draft.

Mr. Castillo believes a request such as this from EBSA is highly unusual explaining that it is usual practice for a union to make such a request, not EBSA. Mr. Castillo also believes that the e-mail was written favorable to reflect the Asbestos Workers Local 12 Union, not EBSA. It is Mr. Castillo's position that the Asbestos Workers Local 12 Union has never tried to claim an exemption for the issue of investment earnings being used as employer contributions, arguing they can account for all of the money, despite never producing supporting documentation.

Mr. Castillo stated he attended a field training class on July 16, 2008 designed and conducted by ORI in New York. Mr. Castillo identified Regional Director Kay, Mr. Goldberg, Mr. Kade and Ms. Weekley as also attending the training. During the class, Mr. Castillo asked Dave Lorie ORI, DOL, who was conducting the training, if loans receivable are considered plan assets and he indicated that was correct. Mr. Castillo purposely asked this question in the presence of his managers and SOL employees to discredit their interpretations of his findings in the Asbestos Workers Local 12 Funds investigation.

During the February 12, 2009 interview with Mr. Goldberg (**Attachment 8**), he advised that sometime in early 2006, Regional Director Kay suggested briefing SOL, New York RO on the Asbestos Workers Local 12 Funds investigation in an attempt to reach an agreement on the various investigative issues. A meeting was then held at SOL, which was attended by Ms. Weekley, SOL, and Dennis Kade, Supervisory Attorney, SOL, New York RO. Regional Director Kay, Mr. Castillo and Mr. Goldberg. During this meeting, Ms. Weekley and Mr. Kade



suggested eliminating some of the accounting issues identified in the Asbestos Workers Local 12 fund investigation due to a lack of documentation. Mr. Goldberg stated that Mr. Castillo did not object to any of these recommendations during this meeting.

After this meeting, Mr. Goldberg advised Mr. Castillo to prepare a ROI on the Asbestos Workers Local 12 fund investigation, which would then be submitted to the New York RO SOL. Mr. Goldberg explained that under the direction of Regional Director Kay, the Asbestos Workers Local 12 Funds investigation was divided into two parts. This decision was made due to the fact that Mr. Castillo's claim that earnings were being used by the Local 12 Plan Administrator as employer contributions instead of being allocated to the Annuity Fund participants did not, at this time, have sufficient data to support the claim. Regional Director Kay and Mr. Goldberg felt that Mr. Castillo needed additional information before proceeding with this issue, as well as other issues he had identified in his investigation.

Mr. Goldberg identified the following four issues that made up Part 2 of the Asbestos Workers Local 12 Funds investigation:

1. The Annuity Fund trustees used a portion of the Annuity Fund's 2000 investment earnings as part of employer contribution to Plan custodian New York Life on October 19, 2001.
2. The Annuity Fund trustees failed to allocate the 2000 investment earnings to participants.
3. The Annuity Fund trustees used Annuity Fund assets to augment contributing employer monies that were transmitted to Plan custodian New York Life.
4. The Fund trustees transferred monies from the Welfare Fund to the Annuity Fund for non-annuity Fund related purposes.

Mr. Goldberg advised that given the documents presented by Mr. Castillo pertaining to the above issues, neither he nor Regional Director Kay could make a determination at this time if any violations actually existed. Mr. Goldberg stated that Regional Director Kay made the decision to forward Mr. Castillo's ROI for Part 2 of the Asbestos Workers Local 12 Funds investigation to SOL, New York RO, for their review and interpretation. After reviewing the information, Ms. Weekley requested additional information and documentation from the Asbestos Workers Local 12 Union's attorney's and accountants to assist in resolving the remaining four issues.

According to Mr. Goldberg, additional attempts were made to clarify the complex accounting principles associated with the remaining four issues, during which Regional Director Kay contacted Scott Albert, Chief, Division of Reporting Compliance, Office of the Chief Accountant, (OCA) EBSA, DOL, Washington, DC, in December 2008. Mr. Albert was requested to attend a meeting with EBSA in New York to review issues one and two in Part 2 of the Asbestos Workers Local 12 Funds investigation. EBSA and SOL were awaiting additional documentation from the Asbestos Workers Local 12 Union accountants and attorneys to further address issues three and four.

Mr. Goldberg stated this meeting was attended by himself, Regional Director Kay, Mr. Kade, Ms. Weekley, and Mr. Castillo. It was the conclusion of Mr. Albert during this meeting that additional documentation would be needed from the Asbestos Workers Local 12 union trustees to determine if the issues in question constituted a violation. According to Mr. Goldberg, Mr. Castillo was responsive and cooperative in this meeting and answered questions from Mr. Albert without incident. At the conclusion of his analysis, Mr. Albert would issue EBSA a report on OCA's interpretation of issues one and two.

During the March 11, 2009 interview with Regional Director Kay (**Attachment 9**), he stated he realized there were areas of the Asbestos Workers Local 12 Funds investigation that could potentially be settled. Regional Director Kay was also aware there were other areas of the investigation that had complex accounting issues that needed to be resolved. In an attempt to expedite the investigation, Regional Director Kay made the decision to divide the investigation into two parts and submit Part 1 to SOL, New York RO to initiate a settlement with the Asbestos Workers Local 12 Union trustees. A settlement was reached on Part 1 of the Asbestos Workers Local 12 Funds investigation and efforts were focused on understanding and resolving four remaining unresolved issues in Part 2 of the investigation.

It was at this time that Mr. Castillo became increasingly agitated and would argue at case reviews that the Asbestos Workers Local 12 Union accountants and trustees were committing fraud. Regional Director Kay revealed he was skeptical about some of Mr. Castillo's investigative findings, which he believes fueled Mr. Castillo's beliefs that his investigation was being undermined.

According to Regional Director Kay, EBSA management had numerous discussions and debates with Mr. Castillo relating to the four unresolved issues in the investigation. In regards to issue three pertaining to whether or not a shortfall existed in the Asbestos Workers Local 12 Union Annuity funds, Regional Director Kay contacted David Lurie, Senior Pension Law Specialist, ORI, DOL, Washington, DC (**Attachment 15**). Regional Director Kay asked Mr. Lurie for his interpretation on any discretion the Asbestos Workers Local 12

Union trustees had if a shortfall existed and how they could treat employer contributions if there was a shortfall.

Regional Director Kay advised he first drafted an e-mail in April 2008 to Mr. Monhart, Chief, Office of Enforcement, EBSA, Washington, DC, asking Mr. Monhart to obtain an interpretation from ORI on the questioned investigative issues (**Attachment 16**). Regional Director Kay never sent this e-mail, deciding later to contact ORI with the request himself. Regional Director Kay denied asking ORI if a specific action by the Asbestos Workers Local 12 Union trustees was an exemption, as claimed by Mr. Castillo. Regional Director Kay stated he specifically asked the Office of Enforcement for their interpretation of the questioned issues.

In describing the complexity of these accounting issues, Regional Director Kay stated he also solicited OCA, EBSA, Washington, DC for their interpretation of issues one and two of Part 2 of the Asbestos Workers Local 12 Funds investigation.

According to Regional Director Kay, he decided to allow Mr. Castillo to submit a ROI to SOL, New York RO for Part 2 of the Asbestos Workers Local 12 Funds investigation, which was completed and submitted by Mr. Castillo in December 2007. Regional Director Kay asserted that despite his concerns over Mr. Castillo's theories and the questions pertaining to the investigative issues raised by Mr. Castillo, he decided to forward Mr. Castillo's ROI to SOL, New York RO for their interpretation. Regional Director Kay indicated he did not remove any of Mr. Castillo's findings from the ROI and forwarded it in its entirety to SOL.

On February 12, 2009, AIG Cunningham and I interviewed Ms. Weekley and her supervisor Mr. Kade, SOL, New York RO and requested a written sworn statement (**Attachment 17**). Ms. Weekley stated that she received Mr. Castillo's ROI for Part 2 of the Asbestos Workers Local 12 Funds investigation in December 2007 and began work on it in January 2008. According to Ms. Weekley, Mr. Castillo's ROI for Part 2 was lengthy and contained approximately 100 exhibits of documentary evidence. Ms. Weekley described Part 2 of the Asbestos Workers Local 12 Funds investigation as containing very complex accounting issues, which were not clear cut. Ms. Weekley identified the following four issues involved in Part 2 of the Asbestos Workers Local 12 Funds investigation:

1. Alleged failure of the trustees to allocate to participant accounts \$381,000 in year 2000 Annuity Fund earnings.
2. Alleged failure of the trustees to allocate to participant accounts approximately \$1.9 million in year 2000 Annuity Fund earnings.

3. Alleged use of fund assets to augment employer contributions.
4. Unexplained transfer of monies from the Welfare Fund to the Annuity Fund.

Both Ms. Weekley and Mr. Kade stated they had reservations as to whether or not Mr. Castillo's second issue pertaining to the \$1.8 million, could be considered a violation. Ms. Weekley indicated that after reviewing Mr. Castillo's ROI and exhibits, she had several meetings with Mr. Castillo and Mr. Goldberg to discuss the issues of Part 2 of the Asbestos Workers Local 12 Fund investigation. It was during these meetings that Mr. Castillo started to become agitated and confrontational when Ms. Weekley and Mr. Kade questioned his investigative theories.

Ms. Weekley stated that Mr. Castillo continuously argued that no one has been able to produce documents to dispute his findings or support the Asbestos Workers Local 12 Union trustees' claims. Ms. Weekley reported Mr. Castillo accused the Asbestos Workers Local 12 Union trustees and accountants of committing accounting fraud and "spinning the investigation." Mr. Castillo also referred to these individuals as "high priced lawyers and accountants covering up a fraud."

Mr. Kade and Ms. Weekley specified that due to the complex issues involved in Part 2 of the Asbestos Workers Local 12 Union Fund investigation, SOL decided to solicit the assistance of ORI, DOL, for their analysis and opinion of the investigative issues. Ms. Weekley stated ORI rendered an opinion that union trustees are entitled to override the plan document, which directs them to distribute money earnings back to the investors. In this case, the Asbestos Workers Local 12 Union trustees used earnings to fund a "go live" option and therefore, in the opinion of ORI, the accounting actions could be legal.

Ms. Weekley reported that EBSA had also sought outside opinion regarding the complex accounting issues in Mr. Castillo's investigative findings and contacted OCA, DOL, Washington, DC, to review and interpret the issues. Ms. Weekley explained that Mr. Castillo's main argument was that the participant account balances contained more money than actual assets in the trust account and that this money should have been returned to the plan participants. Ms. Weekley pointed out that one flaw in Mr. Castillo's findings was that his information was obtained from a "snapshot" of the union accounts, which would naturally show an imbalance of funds. Ms. Weekley also feels Mr. Castillo is in error in his assertion that participant loans should be included as plan assets.

Mr. Castillo, according to Ms. Weekley became increasingly combative in the spring of 2008, during meetings and telephone conversations regarding discussions of his

investigative findings in Part 2 of the Asbestos Workers Local 12 Fund investigation. Mr. Castillo would constantly use words like "spin" and "fraud" to describe the actions of others offering alternate views of his investigative findings. Ms. Weekley advised Mr. Castillo began sending belligerent e-mails to her and others involved in the investigation accusing them of improper conduct.

Both Mr. Kade and Ms. Weekley denied any claims that they or SOL has or attempted to impede or hinder the Asbestos Workers Local 12 Fund investigation. Mr. Kade suggested that the Asbestos Workers Local 12 Fund investigation was actually expedited by SOL at EBSA's request.

On March 4, 2009, AIG Cunningham and I interviewed Scott Albert, OCA, EBSA, DOL, Washington, DC and requested a written sworn statement (**Attachment 18**). Mr. Albert advised that in December 2008, Regional Director Kay had contacted his supervisor, Ian Dingwall and requested OCA to provide assistance in interpreting several accounting issues involved with the Asbestos Workers Local 12 Funds investigation. Mr. Albert stated he was assigned to assist EBSA and traveled to the EBSA New York RO for a meeting on December 15, 2008. This meeting, according to Mr. Albert, was to review various accounting issues identified by Mr. Castillo and was attended by himself, Mr. Castillo, Regional Director Kay, Mr. Goldberg and several representatives from EBSA New York RO SOL.

Mr. Albert indicated that during this meeting, Mr. Castillo presented his argument that the Asbestos Workers Local 12 participant loans were improperly included in the participant account balances, which at the time represented a total of approximately \$46 million. Mr. Castillo further argued that the participant loans are not only assets but are also considered investments.

Mr. Albert stated that he gave his opinion at the meeting that the Asbestos Workers Local 12 participant loans are receivable and considered an asset because the money is owed to the union, but pointed out that the assets are not readily tradable. Mr. Albert told the group that the question EBSA should be looking at is not if the participant loans are a plan asset, but how the assets are being treated in the accounting process.

Mr. Albert advised that Mr. Castillo became very agitated at his statements and complained that he (Albert) did not fully understand the investigation. Mr. Albert indicated that Mr. Castillo continued to defend his theories and findings despite the fact that he failed to produce any documentation backing up his allegation that the Asbestos Workers Local 12 Union or their accounting firm was committing fraud.

Mr. Albert reported that since this meeting he has conducted a thorough investigation into Mr. Castillo's claims that the Asbestos Workers Local 12 Union trustees and accountants failed

to include loan receivables in the reported value of the funds actual assets, which was the reason why the total value was less than the total value represented in the participant's account balances.

Mr. Albert explained that he conducted his investigation as an impartial party, attempting to find some validity in Mr. Castillo's claims that the Asbestos Workers Local 12 Union committed fraud. According to Mr. Albert, his involvement was neither to support or disclaim Mr. Castillo's findings but to provide an interpretation of the accounting principles identified in Mr. Castillo's investigation.

On March 26, 2009, Mr. Albert submitted his report "A Practical Inquiry into the Existence of a \$1.9 Million Shortfall Suffered by the Asbestos Workers Annuity Fund and the Propriety of the Action Taken by the Plan's Trustees to Eliminate It" to Regional Director Kay (**Attachment 19**). Mr. Albert concluded that Mr. Castillo's allegations pertaining to issues one and two in Part 2 of the Asbestos Workers Local 12 Annuity Funds investigation were not adequately supported or argued by Mr. Castillo.

This report examined the following issues identified by Mr. Castillo during his investigation of the Asbestos Workers Local 12 Funds investigations:

1. During the 2000 to 2001 plan year, approximately \$381,000 in Asbestos Workers Annuity Fund earnings was paid out of the Fund without documentation or written explanation. Mr. Castillo further alleged that \$381,000 of the Asbestos Workers Local 12 Annuity Fund's investment earnings was used by the Asbestos Workers Local 12 plan administrator as employer contributions instead of being allocated to the fund participants. Mr. Castillo claimed there was no shortfall in the Annuity Fund as claimed by the union trustees and backed up by the accounting firm of Schultheis and Panetieri.
  - Mr. Albert concluded that the basis for Mr. Castillo's above claims are insufficient and that he was unable to demonstrate that there was not a shortfall in the Asbestos Workers Local 12 Annuity Fund. Mr. Albert further concluded that Mr. Castillo's analysis attempting to support his claims were flawed.
2. The Asbestos Workers Local 12 Annuity Fund's earnings for CY 2000 (totaling approximately \$1.8 million) were not allocated to individual participant accounts, even though the Fund appears to have had more than sufficient assets to cover all participant account balances and to meet its other obligations. Mr. Castillo alleged the Annuity Fund Interest Allocation Analysis produced by Schultheis and Panetieri for the period CY 1990 through CY 2000

was incorrect and fraudulent because Schultheis and Panetieri did not use data supplied in the audited financial statements from this period.

- After analyzing this issue, Mr. Albert determined that Schultheis and Panetieri knew that the audited financial statements were inaccurate due to the poor job done by the previous auditors for the Annuity Fund. By reviewing the various accounting statements, Mr. Albert discovered Schultheis and Panetieri's analysis was based on data from the 5500 forms not the audited financial statements. Mr. Albert found these calculations reasonable due to the fact that the audited financial statements from this period were incorrect.

Although the information in the Annuity Fund Interest Allocation Analysis should have come from the audited financial statements, Schultheis and Panetieri had to use data from the 5500 forms due to the inaccuracies in the audited financial statements. Mr. Castillo had not discovered that the data represented in the audited financial statements from the previous auditors was inaccurate and poorly calculated. If this data had been used instead of the data from the 5500 forms, the Annuity Fund Interest Allocation Analysis would have been incorrect.

Mr. Albert stated that throughout his investigation, he has been met by resistance from Mr. Castillo in providing documentation to support his findings, which caused delays in his reviews. When requesting information from Mr. Castillo, Mr. Albert stated he would get incomplete or unrelated data. Mr. Castillo, on numerous occasions, told Mr. Albert that his work papers back up his conclusions; however, according to Mr. Albert, the information Mr. Castillo has provided fails to support his claims.

During the course of Mr. Albert's investigation, Mr. Castillo had advised him that other EBSA "Certified Public Accountants" in his office had agreed with his findings. Mr. Albert identified two of these individuals as Walter Blonski and Carmela Pagano. After contacting these individuals, Mr. Albert determined that Mr. Castillo had only partially explained his findings with little detail and gave them only partial information, which would result in a favorable response and lend support to Mr. Castillo's findings. When Mr. Albert confronted Mr. Blonski and Ms. Pagano with all of the facts relating to Mr. Castillo's findings, both agreed that Mr. Castillo's findings may be flawed.

Mr. Albert feels that Mr. Castillo has become obsessed with his findings and refuses to listen to any rational argument against his claims. Mr. Albert described Mr. Castillo as unprofessional and very combative during his contact with him. Mr. Albert has received several e-mails from Mr. Castillo that he describes as rambling and often accusing Mr. Albert of providing incorrect data to disprove his (Castillo) findings (**Attachment 20**). In the latest e-

mail Mr. Albert received from Mr. Castillo dated March 2, 2009 (**Attachment 21**), Mr. Castillo accused Mr. Albert of "undermining his investigation."

On April 6, 2009, AIG Cunningham and I interviewed Jeffrey A. Monhart, Chief, Division of Field Operations, Office of Enforcement, EBSA, DOL, Washington, DC and requested a written sworn statement (**Attachment 22**). Chief Monhart advised he was asked by Virginia Smith, Director, Office of Enforcement, EBSA, DOL, to serve as Acting Deputy Director, EBSA New York RO from May 21, 2007 through August 16, 2007 after the retirement of Deputy Director Gaynor. In addition to performing the normal duties of the deputy director, Chief Monhart was also asked to observe the performance of the EBSA New York RO managers.

According to Chief Monhart, EBSA New York RO had recently appointed several first line supervisors, in addition to Regional Director Kay, who was also relatively new in his position. Chief Monhart was also asked to monitor several of the EBSA New York RO investigations and attempt to resolve issues that were delaying these investigations. Included in this was the Asbestos Workers Local 12 Funds investigation. Chief Monhart advised that EBSA New York RO had developed a reputation for their inability to proceed with investigations in a timely manner, which involved experienced opposing legal counsel.

Upon his arrival at EBSA, New York RO, Chief Monhart stated he informed Regional Director Kay he expected to see progress in resolving the cases that had been moving slowly, including the Asbestos Workers Local 12 Funds investigation. During his temporary assignment in EBSA, New York RO, Chief Monhart reported he had attended several status meetings regarding the Asbestos Workers Local 12 Funds investigation. Chief Monhart also advised that once he arrived in New York, Mr. Castillo would often come into his office (uninvited) and complain to him that his supervisors were not supporting him and stalling the Asbestos Workers Local 12 investigation. Chief Monhart recalled Mr. Castillo's specific complaints that his supervisors had ignored evidence of criminal violations and had overlooked civil violations concerning alleged shortfalls in the Asbestos Workers Local 12 Annuity Fund.

During his exposure to the Asbestos Workers Local 12 Funds investigation, Chief Monhart concluded that EBSA New York RO management was too accommodating to the attorneys representing the Asbestos Workers Local 12 Union and believes this contributed to delaying the resolution of the case. Chief Monhart stated he recommended issuing subpoenas for the requested case documents to explain fund shortages and transfers instead of continued meetings that did little to resolve the investigative issues.

Chief Monhart recalled that after his temporary assignment in EBSA, New York RO, the pace of the Asbestos Workers Local 12 Funds investigation did increase. According to Chief



Monhart, all parties agreed to a settlement to one group of issues and Regional Director Kay made the decision to solicit outside opinions from EBSA's ORI and OCA regarding the remaining issues of a purported shortfall. Chief Monhart believes Regional Director Kay made the right decision in moving the Asbestos Workers Local 12 Funds investigation on to EBSA's SOL and requesting opinions from ORI and OCA.

Chief Monhart believes that skilled supervision could have averted some of the delays in the investigation. Chief Monhart identifies inexperienced supervision as a cause of the delays, and does not attribute these delays to any collusion or unlawful conduct by EBSA New York RO management. Chief Monhart did not nor has not observed any evidence that would substantiate Mr. Castillo's allegations that his supervisors delayed and stalled the Asbestos Workers Local 12 Funds investigation for the purpose of making Mr. Castillo look bad.

On April 6, 2009, AIG Cunningham and I interviewed Alan D. Lebowitz, Deputy Assistant Secretary (DAS), Program Operations, EBSA, DOL, Washington, DC (**Attachment 23**). When questioned about the Asbestos Workers Local 12 Funds investigation, DAS Lebowitz stated he normally would not be aware of specific investigations, but had become familiar with the investigation after being carbon copied on various e-mails from Mr. [REDACTED], a retired Asbestos Workers Local 12 Union employee and funds participant. DAS Lebowitz also remembered receiving several e-mails directly from Mr. [REDACTED] and believes he may have had several telephone conversations with him regarding complaints to him about the amount of time the investigation was taking.

DAS Lebowitz recalled reading e-mails Mr. Castillo had sent to various DOL officials, including the Secretary of Labor, complaining that the Asbestos Workers Local 12 Funds investigation, which he was assigned as the lead investigator, was being delayed by his supervisors. After reviewing the Asbestos Workers Local 12 Funds investigation, DAS Lebowitz concluded the investigation was taking longer than usual to conclude and contacted Director Smith, Office of Enforcement, DOL, Washington, DC, and asked her to look into the matter.

DAS Lebowitz indicated that Director Smith identified several issues, which were causing the delay in the investigation. Director Smith explained that the investigation had initially been reassigned to various EBSA, New York RO supervisors and that once it was referred to the New York RO SOL, several issues pertaining to the validity of Mr. Castillo's investigative findings caused further delays.

According to DAS Lebowitz, nothing reported to him by Director Smith as well as any further information he has obtained regarding the Asbestos Workers Local 12 Funds investigation has led him to believe that the investigation was purposely delayed or

stalled. DAS Lebowitz did comment that there were areas of the case, which could have been managed differently to expedite the investigation but does not believe EBSA management had intentionally caused delays.

During the April 28, 2009 interview of Director Smith (**Attachment 12**), she advised that after the retirement of Deputy Director Gaynor, EBSA, New York RO, Director Smith temporarily assigned Chief Monhart as Acting Deputy Director, EBSA, New York RO. According to Director Smith, this decision was made for a variety of reasons, which included:

- Providing Chief Monhart with an opportunity to develop field experience.
- Utilizing Chief Monhart to develop and assist new and inexperienced managers in EBSA's New York RO.
- Using Chief Monhart's experience and knowledge to assist with EBSA's case management.
- Allowing Chief Monhart to provide assistance in the Asbestos Workers Local 12 Funds investigation.

Director Smith believes that Chief Monhart was successful in providing oversight and assistance in the Asbestos Workers Local 12 Funds investigation, which helped to move the case along.

Director Smith stated she met with Regional Director Kay and Patricia Rodenhausen, Regional Solicitor of Labor (RSOL), SOL, New York RO on April 21, 2009 and discussed the status of the Asbestos Workers Local 12 Funds investigation. Director Smith advised that the four remaining issues in Part 2 of the Asbestos Workers Local 12 Funds investigation have now been resolved and the investigation should be closed shortly.

Director Smith admits management flaws from all levels in EBSA, New York RO with respect to the oversight of the Asbestos Workers Local 12 Funds investigation and other investigations, but attributes this only to inexperienced managers and not a grand scheme to prevent Mr. Castillo from being promoted.

### **OSC Allegations 5 and 6 Conclusion**

Mr. Castillo's allegations that \$381,000 of the Asbestos Workers Local 12 Annuity Fund had been improperly used as employer contributions and that Regional Director Kay and Mr. Goldberg impeded his discovery of this suspected violation are unsubstantiated.

Numerous discrepancies were identified in Mr. Castillo's statements regarding the above allegations made during four separate interviews of Mr. Castillo on February 12 and 13, 2009, March 12, 2009 and April 7, 2009. When initially discussing these allegations during his interview on February 12 and 13, 2009, Mr. Castillo only provided partial information that would lend support to his arguments. Mr. Castillo, in subsequent interviews, admitted that the criminal statute of limitations had expired before his discovery of the evidence he claimed supported a criminal violation. Mr. Castillo further admitted he never discussed with Deputy Director Kay his belief that the \$381,000 not properly allocated to the Annuity Fund participants was a criminal violation. Mr. Castillo claimed his actions would be in violation of EBSA policy of circumventing his immediate supervisor, in this case, Mr. Goldberg. This statement was made despite Mr. Castillo's documented actions of submitting e-mails and memorandums to high level EBSA officials, the Inspector General, DOL and the Secretary of Labor, without the prior knowledge or approval of his supervisors.

During interviews with Mr. Castillo, he alleged that if Mr. Goldberg and Regional Director Kay would have examined his documents he presented earlier in this investigation, the issue identifying the suspected improper non allocation of the \$381,000 would have been discovered prior to the expiration of the criminal statute of limitations.

Interviews with Regional Director Kay and Mr. Goldberg revealed that Mr. Castillo's investigative findings were not very clear and lacked proper evidential documentation throughout the various stages of the Asbestos Workers Local 12 Funds investigation. Similar comments were made by Ms Weekley and Mr. Kade even after Regional Director Kay authorized Mr. Castillo's ROI for Part 2 of the Asbestos Workers Local 12 Funds investigation to be sent to the New York RO SOL. Regional Director Kay, despite the fact that he questioned Mr. Castillo's investigative findings, forwarded Mr. Castillo's ROI to SOL, New York RO without any omissions. Further attempts were made by Regional Director Kay and the SOL, New York RO to solicit opinions from ORI and OCA on the various accounting issues that were being questioned.

Attempts by Mr. Castillo to obtain documentation to support his investigative findings were slow, although not always at the fault of Mr. Castillo. Interviews with DAS Lebowitz, Chief Monhart and Director Smith all criticized delays due to the managerial inexperience of EBSA, New York RO; however, none viewed these delays as purposely inflicted by Regional Director Kay or Mr. Goldberg to purposely impede the investigation or conspire against Mr. Castillo.

Finally, after lengthy analysis of Mr. Castillo's four investigative issues in Part 2 of the Asbestos Workers Local 12 Funds investigation, to include the suspected improper non allocation of the \$381,000 SOL, ORI and OCA all agreed that criminal as well as civil

violations did not exist.

### OSC Allegation 7

Mr. Castillo briefed Michael Briglia, Senior Investigator, EBSA, New York RO on his investigative findings in the Asbestos Workers Local 12 Funds investigation. Mr. Briglia was his acting supervisor for several weeks in 2007, while Ms. Langone was out of town. Mr. Castillo alleges that Mr. Briglia initially agreed that there appeared to be criminal violations in the Asbestos Workers Local 12 Funds investigation but contacted him the next day and told Mr. Castillo never to speak to him again regarding this investigation.”

### Investigative Findings

On March 11, 2009, AIG Cunningham and I interviewed Michael Briglia, Senior Investigator, EBSA, New York RO and requested a written sworn statement (**Attachment 24**).

Mr. Briglia reported that early in CY 2007 he was given the assignment of acting supervisor for a short period of time, while his supervisor Nichelle Langone was away from the office. According to Mr. Briglia, it was at this time that Mr. Castillo approached him regarding the Asbestos Workers Local 12 Funds investigation. Mr. Castillo wanted Mr. Briglia to review and render an opinion on some of the documents he had regarding the investigation.

Mr. Briglia could not recall the exact documents but did remember they had to do with the Asbestos Workers Local 12 Union funds accounts and that Mr. Castillo had specific questions regarding accounting procedures used on the documents. Mr. Briglia remembered that the documents, as well as Mr. Castillo’s explanations, seemed confusing and that the issues Mr. Castillo was trying to prove would require additional documents and proof.

When asked if he ever commented to Mr. Castillo that the Asbestos Workers Local 12 Funds investigation appeared to contain criminal violations, Mr. Briglia replied that the documents shown to him by Mr. Castillo did not have enough information for him to make a comment of that nature. Mr. Briglia stated Mr. Castillo never briefed him on the entire Asbestos Workers Local 12 Funds investigation and confined his questions to accounting issues on a group of documents he showed him. Mr. Briglia felt that Mr. Castillo was attempting to gain support for his investigative theories; however, Mr. Briglia did not draw any conclusions due to Mr. Castillo’s lack of documented evidence.

At the time Mr. Castillo came to him, Mr. Briglia was unaware that Ms. Langone was

not Mr. Castillo's supervisor in the Asbestos Workers Local 12 Funds investigation. It was not until Ms. Langone returned to the office that Mr. Briglia learned that Mr. Goldberg had supervisory oversight of this investigation.

During his meeting with Mr. Castillo, Mr. Briglia never gave him any specific instructions pertaining to the Asbestos Workers Local 12 Funds investigation, as was normal procedure for acting supervisors. The only advice Mr. Briglia remembers giving Mr. Castillo during their meeting was that he thought Mr. Castillo needed more information to make his arguments more understandable. Mr. Briglia advised that he does not recall having any further contact with Mr. Castillo regarding the Asbestos Workers Local 12 Funds investigation.

On April 8, 2009, AIG Cunningham and I interviewed Carmela Pagano, Senior Investigator, EBSA, New York RO (**Attachment 25**), and Walter Blonski, Senior Investigator, EBSA, New York RO and requested written sworn statements (**Attachment 26**). Information from these interviews along with the interview of Ms. Langone on March 11, 2009 (**Attachment 10**), all revealed similar comments regarding Mr. Castillo's request for assistance and presentation of documents related to the Asbestos Workers Local 12 Funds investigation.

Mr. Castillo was described as an individual who had a reputation for periodically "shopping" around the office asking various EBSA Certified Public Accountants (CPA) accounting questions. In regards to the Asbestos Workers Local 12 Funds investigation, Mr. Castillo would present documents to support his investigative findings that seemed incomplete and lacking information needed to answer his questions. Documents presented by Mr. Castillo did not provide the factual information that could be used to establish an audit trail explaining the origin of the assets he was attempting to prove.

None of the individuals interviewed reported being completely briefed by Mr. Castillo on the Asbestos Workers Local 12 Funds investigation. Mr. Castillo, in approaching these individuals, would limit his questions to a specific area(s) of the investigation, in an attempt to solicit answers that would support his theories. All of the individuals interviewed responded to Mr. Castillo that he needed more evidence to support and prove his intended accusations.

### **OSC Allegation 7 Conclusion**

Mr. Castillo's allegations that he briefed Mr. Briglia on the Asbestos Workers Local 12 Funds investigation and that Mr. Briglia agreed that criminal violations existed is unsubstantiated. Mr. Castillo's allegation that Mr. Briglia told him he could no longer discuss the investigation with him is also unsubstantiated.

This investigation revealed Mr. Castillo's allegation contradicted Mr. Briglia's response to the

allegation. Mr. Briglia stated during his interview he never agreed with Mr. Castillo that criminal violations were present in the investigation and never told Mr. Castillo he could no longer discuss the investigation with him.

Interviews with EBSA, New York RO employees suggest a pattern exhibited by Mr. Castillo, where he would attempt to gain support and confirmation of his investigative theories based on little or incomplete evidence. Mr. Castillo would then claim that other EBSA employees had agreed that the Asbestos Workers Local 12 Funds investigation contained criminal violations.

### **Interviews of Jose Castillo and Additional Allegations**

Mr. Castillo was interviewed on four separate occasions, February 12 and 13, 2009 (**Attachment 13**), March 12, 2009 (**Attachment 14**) and April 7, 2009 (**Attachment 2**), by AIG Cunningham and me. Individuals and allegations identified by Mr. Castillo varied in quantity, descriptive nature and accuracy between interviews. The following additional allegations were identified during these interviews and were not originally submitted by Mr. Castillo to the Office of Special Counsel.

#### **Castillo Interview: February 12 and 13, 2009**

During the February 12 and 13, 2009 interview of Mr. Castillo at EBSA, New York RO, (**Attachment 13**) he identified the following individuals as hindering and interfering with the Asbestos Workers Local 12 Funds investigation:

- Regional Director Kay
- Former Deputy Director Gaynor
- Group Supervisor Goldberg
- Patricia Rodenhauen, Regional Solicitor of Labor (RSOL), Office of the Solicitor (SOL), EBSA, New York Region, DOL.
- Jennefer Weekly, Attorney, SOL, EBSA, New York Region, DOL.
- Sherwin Kaplan, Attorney, Thelen, Reid, Brown, Raysman and Steiner (attorney representing the accounting firm of Schultheis and Panettieri)

#### **Additional Allegation From February 12 – 13, 2009 Interview**

Regional Director Kay delayed the Asbestos Workers Local 12 Funds investigation to support his claim that he (Castillo) was doing a poor job with the investigation, which would give Regional Director Kay an excuse not to promote him.

#### **Investigative Findings**

During the March 11, 2009 interview with Regional Director Kay (**Attachment 9**) he stated Mr. Castillo is presently assigned to EBSA, New York RO, as an investigator at the GS-12 grade level. Mr. Castillo has applied for a GS-13 position within EBSA, New York RO three times since January 2005 and was not selected for these positions. According to Regional

Director Kay, each time Mr. Castillo was not selected for promotion, he filed an Equal Employment Opportunity (EEO) complaint based on retaliation. Regional Director Kay stated all of the EEO complaints were investigated and found to be without merit (**Attachment 27**). Regional Director Kay had not had any disciplinary problems with Mr. Castillo prior to Part 2 of the Asbestos Workers Local 12 Funds investigation. Mr. Castillo's performance evaluations for FY 2007 and FY 2008 were effective and highly effective. Regional Director Kay pointed out that Mr. Castillo's performance evaluation for FY 2008 was higher than the previous year.

During the March 11, 2009 interview with Ms. Langone (**Attachment 10**) she stated she has prepared Mr. Castillo's Performance Appraisals for FY 2007 and FY 2008. Mr. Castillo's rating in FY 2007 was "effective" and "highly effective" in FY 2008. Ms. Langone added that in FY 2008, Mr. Castillo had litigation cases, which required his deposition and the deposition of multiple defendants, which according to Ms. Langone, Mr. Castillo's actions were instrumental in resolving the cases.

Regarding Mr. Castillo's case assignment history, Ms. Langone made the following comments:

- She has never assigned Mr. Castillo a criminal case and he has never requested to work a criminal case under her supervision.
- She is not sure if Mr. Castillo has conducted a criminal investigation during his employment with EBSA.
- She believes the demands of a criminal investigation are outside the comfort zone of Mr. Castillo.
- She believes Mr. Castillo needs specific direction in his case work and performs better when told exactly what to do.
- Mr. Castillo carries the same case load as other investigators assigned to her track.
- Mr. Castillo is a very hard worker but has problems with his reports, explaining his work in writing.

### **Conclusion**

No evidence could be found to support the allegation that Regional Director Kay delayed the Asbestos Workers Local 12 Funds investigation in an effort to not promote Mr. Castillo.



### **Additional Allegation From February 12 - 13 2009 Interview**

Regional Director Kay influenced his wife, RSOL Rodenhausen, EBSA, New York RO, DOL, to also delay the Asbestos Workers Local 12 Funds investigation from SOL.

### **Investigative Findings**

During the March 11, 2009 interview with Regional Director Kay (**Attachment 9**) he denied influencing his wife, RSOL Rodenhausen or being influenced by her in any matters pertaining to the Asbestos Workers Local 12 Funds investigation. He did admit discussing the components of this case with RSOL Rodenhausen but stated he has never discussed personnel issues relating to Mr. Castillo with her.

On March 10, 2009, AIG Cunningham and I interviewed RSOL Rodenhausen at SOL, EBSA, New York RO (**Attachment 28**), who indicated she has never gotten the impression that EBSA management was attempting to stall or interfere with the Asbestos Workers Local 12 Funds investigation. RSOL Rodenhausen confirmed that she was never asked by anyone to delay the investigation.

### **Conclusion**

This investigation concluded that Mr. Castillo's allegation that Regional Director Kay influenced his wife, RSOL Rodenhausen to delay the Asbestos Workers Local 12 Funds investigation is unsubstantiated. Interviews conducted during this investigation revealed no information that would lend merit to this allegation.

### **Additional Allegation From February 12 - 13, 2009 Interview**

RSOL Rodenhausen banned Mr. Castillo from attending meetings held at SOL pertaining to the Asbestos Workers Local 12 Funds investigation.

### **Investigative Findings**

During the March 10, 2009 interview with RSOL Rodenhausen (**Attachment 28**), she advised that sometime after SOL had issued EBSA a copy of Ms. Weekley's legal analysis draft of the Asbestos Workers Local 12 investigation, Ms. Weekley came to her concerned about e-mails that were being sent by Mr. Castillo. Ms. Weekley reported the e-mails from Mr. Castillo were being sent not only to her, but other EBSA management and DOL officials to include the Secretary of Labor. Shortly after this, RSOL Rodenhausen began to be copied on e-mails by Mr. Castillo, in which he was complaining that EBSA and SOL were not accepting his investigative findings in the

Asbestos Workers Local 12 Funds investigation (**Attachment 29**). According to RSOL Rodenhausen, some of Mr. Castillo's e-mails were also sent to SOL's national office.

RSOL Rodenhausen described Mr. Castillo's e-mails as ranting, containing scrambled English, and very poor arguments outlining his disputes and conclusions. RSOL Rodenhausen was also receiving further complaints from Ms. Weekley, that her reputation was being challenged by Mr. Castillo in many of these e-mails. Ms. Weekley was advised by RSOL Rodenhausen not to respond to anymore of Mr. Castillo's e-mails and to communicate only with Mr. Castillo's supervisors at EBSA. It was at this time that RSOL Rodenhausen decided that Mr. Castillo should not attend an upcoming meeting at SOL, which was scheduled to discuss SOL's legal analysis of the Asbestos Workers Local 12 Funds investigation.

RSOL Rodenhausen had discussed her decision with Mr. Castillo's supervisors, Regional Director Kay and Mr. Goldberg, who asked her to reconsider allowing him to attend the meeting due to Mr. Castillo's involvement in the investigation. RSOL Rodenhausen had also received a request through Regional Director Kay from Director Smith, EBSA, DOL, Washington, DC, to reconsider her decision. RSOL Rodenhausen again based her decision on Mr. Castillo's consistent poor judgment in sending his e-mails and the fact that EBSA supervisors, not the investigators usually attend these meetings. RSOL Rodenhausen suggested Mr. Castillo's supervisors could later brief him on the meeting.

During the March 11, 2009 interview with Regional Director Kay (**Attachment 9**), he confirmed he had been contacted by RSOL Rodenhausen, regarding concerns pertaining to Mr. Castillo's increasingly disruptive behavior. Regional Director Kay was informed by RSOL Rodenhausen that she did not want Mr. Castillo attending a meeting, which was scheduled with SOL attorney Jennifer Weekley and the Asbestos Workers Local 12 Union representatives due to the unprofessional comments he had expressed in e-mails to her, Ms. Weekley and other high level DOL officials. This meeting was attended by Mr. Goldberg, who along with Ms. Weekley presented Mr. Castillo with a written summary of the topics discussed during the meeting. Regional Director Kay could not recall if he or Mr. Goldberg told Mr. Castillo he would not be attending the meeting but did remember Mr. Castillo being surprised and concerned when told.

During the February 12, 2009 interview with Mr. Goldberg (**Attachment 8**), he advised that in July 2008, RSOL Rodenhausen, asked that Mr. Castillo be banned from further meetings at SOL. This request was made due to Mr. Castillo's disruptive nature and the various e-mails he has sent accusing individuals from SOL of being involved in a cover-up with the Asbestos Workers Local 12 Union.

Mr. Goldberg pointed out that EBSA did not remove Mr. Castillo from the Asbestos Workers Local 12 fund investigation and he continues to be informed on the status of case meetings and is requested to follow-up on investigative requests from SOL.

### **Conclusion**

Mr. Castillo's allegation that RSOL Rodenhausen banned him from attending meetings held at SOL pertaining to the Asbestos Workers Local 12 Funds investigation is substantiated. The decision was made by RSOL Rodenhausen in the interest of SOL to promote a non-confrontational meeting and expedite the settlement of the remaining issues in Part 2 of the Asbestos Workers Local 12 Funds investigation. Mr. Castillo was still allowed to communicate with Ms. Weekley and his supervisors regarding the investigation and was still considered the lead investigator in the case.

### **Additional Allegation From February 12 - 13 2009, Interview**

Attorney Sherwin Kaplan, who represents the Asbestos Workers Local 12 trustees' accounting firm of Schultheis and Panettieri, purposely disagreed with Mr. Castillo's investigative issues to delay the investigation.

Mr. Kaplan, due to his prior employment with EBSA and personal friendship with Regional Director Kay and his wife RSOL Rodenhausen, has influenced EBSA and SOL management to make decisions in favor with the Asbestos Workers Local 12 Union trustees.

### **Investigative Findings**

Due to the fact that EBSA still has an open investigation into the Asbestos Workers Local 12 Union, and Mr. Kaplan's association with this union through the firm Schultheis and Panettieri, Mr. Kaplan was not interviewed.

During the February 12, 2009 interview with Mr. Goldberg (**Attachment 8**), he was asked about his relationship with Mr. Kaplan. Mr. Goldberg stated that Mr. Kaplan had been gone from EBSA for a long time and that he never worked with Mr. Kaplan nor socialized with him. Mr. Goldberg added that the only recent contact he has had with Mr. Kaplan was during the meetings involving the Asbestos Workers Local 12 fund investigation.

During the March 11, 2009 interview with Regional Director Kay (**Attachment 9**) he was asked about his relationship with Mr. Kaplan and made the following statements:

- Mr. Kaplan was formerly employed as an attorney with DOL in Washington, DC.
- He has known Mr. Kaplan for approximately 15 years.
- He does not and has not had a personal relationship with Mr. Kaplan.
- His association with Mr. Kaplan was only through various conferences he and Mr. Kaplan attended, while Mr. Kaplan was employed with DOL.
- He believes Mr. Kaplan left the government for private practice approximately four or five years ago.
- He has never been contacted by Mr. Kaplan or spoken to him regarding the Asbestos Workers Local 12 Funds investigation.
- He denied Mr. Kaplan ever attempted to influence him to disagree with Mr. Castillo's investigative findings in the Asbestos Workers Local 12 Funds investigation.

During the interview of Chief Monhart on April 6, 2009 (**Attachment 22**), he was questioned about his association with EBSA, New York RO and concluded that EBSA, New York RO management was too accommodating to the attorneys representing the Asbestos Workers Local 12 Union. Chief Monhart identified inexperienced supervision as a factor in being over accommodating to the union attorneys and does not attribute this to any collusion or unlawful conduct by Regional Director Kay or other EBSA New York RO managers.

### **Conclusion**

Mr. Castillo's allegation that Mr. Kaplan had a personal relationship with Regional Director Kay and RSOL Rodenhausen, which enabled him to have influence over and delay the Asbestos Workers Local 12 Funds investigation is unsubstantiated. Interviews conducted during this investigation failed to identify any evidence that a personal relationship existed between Mr. Kaplan and EBSA managers, to include Regional Director Kay and RSOL Rodenhausen, that in any way influenced the Asbestos Workers Local 12 Funds investigation.

### **Castillo Interview March 12, 2009**

All of the allegations made by Mr. Castillo during his March 12, 2009 interview (**Attachment 14**), although worded differently, were similar to the allegations sent to the Office of Special Counsel and have previously been addressed in this report.

## Castillo Interview April 7, 2009

### Additional Allegation

Mr. Goldberg made facial gestures behind Mr. Castillo's back during the first settlement meeting on November 7, 2005.

### Investigative Findings

During the February 12, 2009 interview with Mr. Goldberg (**Attachment 8**) he indicated a high degree of frustration he felt during the settlement meeting, which he attributed to Mr. Castillo's lack of preparation and lack of input during the meeting. Mr. Goldberg could not recall making facial gestures at Mr. Castillo and indicated any facial gestures he may have made were a result of his frustrations during the meeting and not directed in a personal manner against Mr. Castillo.

During the March 11, 2009 interview with Deputy Director Kay (**Attachment 9**), he advised that Mr. Castillo complained to him that Mr. Goldberg had made facial gestures behind his back at a meeting with Asbestos Workers Local 12 Union trustees, attorneys and accountants. Regional Director Kay believes the only action he took was to advise Mr. Castillo and Mr. Goldberg to work together to resolve any disagreements.

### Conclusion

Mr. Castillo's allegation that Mr. Goldberg made facial gestures behind his back during a settlement meeting could not be substantiated.

### Additional Allegation From April 7, 2009 Interview

Mr. Goldberg wanted to eliminate all of the accounting issues in Mr. Castillo's VC letter due to a lack of solid evidence.

### Investigative Findings

During the February 12, 2009 interview with Mr. Goldberg (**Attachment 8**), he advised he had a meeting with Mr. Castillo prior to a fourth meeting with the Asbestos Workers Local 12 Union sometime early in CY 2006. Mr. Goldberg stated he suggested to Mr. Castillo eliminating one of the accounting issues relating to the accounting firm charging the Asbestos Workers Local 12 Union for work without complete and proper documentation. Mr. Goldberg indicated he wanted to use this as a bargaining tool with the union to reach a settlement regarding the other issues in the investigation. It was at this time, according to

Mr. Goldberg, that Mr. Castillo began accusing him of giving into and supporting the union instead of the EBSA investigative findings. According to Mr. Goldberg, this is common practice when negotiating settlements and is fully within the rights of EBSA managers to initiate such offers.

### **Conclusion**

Mr. Castillo's allegation that Mr. Goldberg wanted to eliminate all of the accounting issues in Mr. Castillo's VC letter due to a lack of solid evidence is unsubstantiated. During an interview with Mr. Goldman, he advised that he suggested to Mr. Castillo eliminating only one of the accounting issues as a bargaining tool to assist in reaching a settlement with the Asbestos Workers Local 12 Union representatives. Mr. Goldberg further stated eliminating some of the weaker issues in an investigation to expedite a settlement is an option often utilized by EBSA managers.

### **Additional Allegation From April 7, 2009 Interview**

Regional Director Kay delayed and stalled the Asbestos Workers Local 12 Funds investigation by keeping Mr. Goldberg assigned as Mr. Castillo's supervisor for this investigation. Mr. Castillo alleges that if Regional Director Kay had kept the investigation under Ms. Langone's supervision when she was named as his acting supervisor, Ms. Langone would have agreed to pursue the criminal violations.

### **Investigative Findings**

During the March 11, 2009 interview with Ms. Langone (**Attachment 10**) she advised that after Regional Director Kay made the decision to keep Mr. Goldberg as Mr. Castillo's supervisor for the Asbestos Workers Local 12 Funds investigation, she remained separated from that investigation. During case reviews, Ms. Langone noticed Mr. Castillo would ask her opinion of scenarios relating to the Asbestos Workers Local 12 Funds investigation. Ms. Langone stated she was always cautious in responding due to her lack of knowledge of the investigation. Ms. Langone indicated Mr. Castillo would inform her he had discussed a referenced scenario with other investigators and accountants at EBSA, indicating they had agreed with his interpretation of the scenario he had discussed with them.

Ms. Langone stated that Mr. Castillo eventually started complaining to her that EBSA did not support his investigative findings in the Asbestos Workers Local 12 Funds investigation and that EBSA management was "stalling" his investigation. Ms. Langone responded to Mr. Castillo's allegations by asking him how he thought EBSA managers would benefit by stalling his investigation. Ms. Langone stated that Mr. Castillo usually did not have an answer or would respond "that's the million dollar question."

Sometime in CY 2008, Ms. Langone recalled a conversation with Mr. Castillo during which he mentioned he felt the Asbestos Workers Local 12 Funds investigation should be presented to a prosecutor for criminal investigation. Having experience with criminal cases, Ms. Langone asked Mr. Castillo pertinent questions relating to his investigation to include the dates of the alleged criminal acts. Judging from Mr. Castillo's responses, it was apparent to Ms. Langone that the statute control date had passed. Ms. Langone explained to Mr. Castillo that due to the complexity of the case and the passing of the statute control date, it didn't seem likely that a prosecutor would agree to pursue the case.

### **Conclusion**

Mr. Castillo's allegation that Regional Director Kay stalled the Asbestos Workers Local 12 Funds investigation by not assigning Ms. Langone as Mr. Castillo's supervisor over the case is unfounded. Ms. Langone explained during her interview that based on the information Mr. Castillo had told her about the Asbestos Workers Local 12 Funds investigation, she would not have recommended that he pursue criminal charges.

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is a retired Asbestos Workers Local 12 Union member and funds participant, currently living in New York. The Asbestos Workers Local 12 Funds investigation was initially opened by EBSA New York RO on February 15, 2002, as a result of a complaint from the Asbestos Workers Local 12 Annuity Fund's administrator. The complaint asserted that the Annuity Fund investment returns for the years 1990 through 1999 had not been properly credited to the participant accounts by the former Annuity Fund administrator.

In February 2003 EBSA New York RO received additional complaints from Mr. alleging he was "shortchanged" on his year 2000 retirement investment earnings. Since this time, Mr. has contacted EBSA New York RO managers and Mr. Castillo on numerous occasions regarding his complaints against the Asbestos Workers Local 12 Union trustees, attorneys and accountants. Mr. has had frequent communication with Mr. Castillo to voice his complaints and provide information he believes involves criminal violations concerning the management of several funds held by the Asbestos Workers Local 12 Union (**Attachment 30**).

Recently, Mr. has become increasingly upset as a result of his perceived belief that EBSA New York RO was mismanaging the Asbestos Workers Local 12 Funds investigation. Mr. has communicated with and sent written correspondence to the Office of U.S. Senator Hilary Rodham Clinton, New York, NY, Daniel Petrole, Deputy Inspector General, DOL, Washington, DC, Alan Lebowitz, Deputy Assistant Secretary, EBSA, Washington, DC, and Howard Shapiro, Council to Inspector General, DOL, Washington, DC (**Attachment 31**).

Mr. refused to be interviewed in this investigation, refusing to become involved in "another worthless, unproductive meeting." Mr. accused the Inspector General's Office, DOL of becoming involved in the Asbestos Workers Local 12 Funds investigation only to legitimize EBSA's investigation (**Attachment 32**).



ALLEGED ABUSE OF AUTHORITY BY EBSA MANAGERS  
ATTACHMENTS

1. U.S. Office of Special Counsel Memorandum
2. Jose Castillo Interview and Sworn Statement (4/7/09)
3. VC Letter (5/3/05)
4. Letter to Jose Castillo from (11/1/05)
5. E-mail to Jose Castillo from Jonathan Kay (11/7/06)
6. ROI Part 1 (5/5/07)
7. ROI Part 2 (11/30/07)
8. Robert Goldberg Interview and Sworn Statement (2/12/09)
9. Jonathan Kay Interview and Sworn Statement (3/11/09)
10. Nichelle Langone Interview and Sworn Statement (3/11/09)
11. Jeffery Gaynor Interview (5/5/09)
12. Virginia Smith Interview and Sworn Statement (4/28/09)
13. Jose Castillo Interview (2/12/09 and 2/13/09)
14. Jose Castillo Interview (3/12/09)
15. E-mail to David Lurie from Jonathan Kay (4/4/08)
16. Draft E-mail to Jeffrey Monhart from Jonathan Kay (4/4/08)
17. Jennifer Weekley/Dennis Kade Interview and Sworn Statement (2/12/09)
18. Scott Albert Interview and Sworn Statement (3/4/09)
19. OCA Report (3/26/09)
20. E-mails to Scott Albert from Jose Castillo
21. E-mail to Scott Albert from Jose Castillo (3/2/09)
22. Jeffery Monhart Interview and Sworn Statement (4/6/09)
23. Alan Lebowitz Interview (4/6/09)
24. Michael Briglia Interview and Sworn Statement (4/8/09)
25. Carmella Pagano Interview and Sworn Statement (4/8/09)
26. Walter Blonski Interview and Sworn Statement (4/8/09)
27. Jose Castillo's EEO Complaint Response from Jonathan Kay (4/17/06)
28. Patricia Rodenhausen Interview (3/10/09)
29. Jose Castillo e-mails to DOL Officials
30. Communication between and Jose Castillo
31. Communication between , EBSA and Govt. Officials
32. E-mail from to Robert Wyche (

**1**

U.S. Department of Labor



FEB - 2 2009

MEMORANDUM FOR GORDON S. HEDDELL  
Inspector General

FROM: EDWARD C. HUGLER  
Acting Secretary of Labor

SUBJECT: Request for an Investigative Report

William E. Reukauf, Acting Special Counsel, of the Office of Special Counsel (OSC) has requested a report, under the provisions of 5 U.S.C. 1213, with respect to allegations by an EBSA employee of abuse of authority in connection with an Asbestos Workers (Local 12) Annuity Fund (**Tab 1**). I request your assistance in investigating these allegations, with particular attention to the first four requirements of section 1213(d).

Please complete your investigation and report your findings to the Secretary, or Acting Secretary, by February 17 so that a response to the OSC can be prepared by the statutory deadline of March 10, unless that date is extended. In order to facilitate your investigation, I have requested that the OSC provide you directly with any supplemental information or evidence that was considered in determining to request a report (**Tab 2**).

Thank you for your assistance in this matter.

Attachments



U.S. OFFICE OF SPECIAL COUNSEL  
1730 M Street, N.W., Suite 218  
Washington, D.C. 20036-4505  
202-254-3600

January 9, 2009

The Honorable Elaine L. Chao  
Secretary  
U.S. Department of Labor  
200 Constitution Ave., NW  
Washington, D.C. 20210

Re: OSC File No. DI-08-3066

Dear Madam Secretary:

Pursuant to my responsibilities as Acting Special Counsel, I am referring to you a whistleblower disclosure that employees at the Department of Labor abused their authority by obstructing an investigation into prohibited transactions under the Employee Retirement Income Security Act (ERISA). The whistleblower, Jose Castillo, Auditor, Employee Benefits Security Administration, New York, New York, alleged that he was prevented from investigating allegations of prohibited transactions under ERISA in a timely manner. Mr. Castillo, who has consented to the release of his name, asserted that this activity constitutes an abuse of authority. Accordingly, I am referring this information to you for an investigation of these allegations and a report of your findings.

The U.S. Office of Special Counsel (OSC) is authorized by law to receive disclosures of information from federal employees alleging violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 1213(a) and (b). As Acting Special Counsel, if I find, on the basis of the information disclosed, that there is a substantial likelihood that one of these conditions exists, I am required to advise the appropriate agency head of my findings, and the agency head is required to conduct an investigation of the allegations and prepare a report. 5 U.S.C. § 1213(c) and (g).

Specifically, Mr. Castillo alleged that he received a letter in November 2005 from [redacted], a participant of the Local 12 Asbestos Workers Annuity Fund (Local 12 Fund). Mr. [redacted] claimed that the Local 12 Fund was defrauded of its earnings from the year 2000. The year 2000 earnings were later determined to be \$1.8 million. Mr. Castillo attempted to discuss the issue of the year 2000 earnings with Group Manager Robert Goldberg, his temporary acting supervisor, but Mr. Goldberg refused to review any of the information Mr. Castillo provided. When Group Manager Nicholle Langone became Mr. Castillo's supervisor in February 2006, Mr. Goldberg remained Mr. Castillo's "special supervisor" for issues related to the Local 12 Fund. In his ten year career at the Employee Benefits Security Administration, Mr. Castillo has never seen a "special supervisor" appointed in any other cases.

The Honorable Elaine L. Chao  
Page 2

In April 2006, Deputy Director Jeffrey Gaynor refused to review Mr. Castillo's Local 12 Fund case after it sat on his desk for a week and a half. In November 2006, Regional Director Jonathan Kay instructed Mr. Castillo not to discuss the Local 12 Fund case with anyone other than Mr. Goldberg or Mr. Kay. Mr. Kay also instructed Mr. Castillo not to contact the trustees' counsels, third party administrators, or Local 12 Funds participants without either Mr. Gaynor's or Mr. Goldberg's approval. Mr. Castillo has never been restricted from contacting such parties in other cases.

In November 2006, Mr. Castillo discovered that \$381,000 of the Local 12 Fund's 2000 earnings was used as an employer contribution. Mr. Castillo alleges that such use is a prohibited transaction in violation of ERISA §§ 404 and 406. Mr. Castillo discussed the Local 12 Fund case with Michael Briglia,<sup>1</sup> who was Mr. Castillo's acting supervisor for a two week period in 2007 when Mr. Goldberg and Ms. Langone were out of town. Mr. Castillo believed he had permission to discuss the case with Mr. Briglia, because Mr. Briglia was his acting supervisor. After hearing the details of the use of \$1.8 million of the Local 12 Fund's year 2000 earnings, including the \$381,000 employer contribution, Mr. Briglia told Mr. Castillo that it appeared to be a criminal violation and that he (Mr. Briglia) would speak with Ms. Langone about the issue. The next day, Mr. Briglia told Mr. Castillo never to speak with him again about the Local 12 Fund.

Mr. Castillo alleged that Mr. Kay and Mr. Goldberg impeded his discovery of the misuse of the Local 12 Funds' 2000 earnings as an employer contribution before the expiration of the 5 year criminal statute of limitations by refusing to examine Mr. Castillo's documented evidence. But for their impediments, a parallel criminal investigation could have been performed with the civil investigation. No criminal investigation was conducted in this matter.

I have concluded that there is a substantial likelihood that the information provided by the whistleblower discloses an abuse of authority. As previously stated, I am referring this information to you for an investigation of these allegations and a report of your findings within 60 days of your receipt of this letter.

By law, the report must be reviewed and signed by you personally. Should you delegate your authority to review and sign the report to the Inspector General, or any other official, the delegation must be specifically stated and must include the authority to take the actions necessary under 5 U.S.C. § 1213(d)(5). Without this information, the report may be found deficient. The requirements of the report are set forth at 5 U.S.C. § 1213(c) and (d). A summary of § 1213(d) is enclosed. As a matter of policy, OSC also requires that your investigators interview the whistleblower as part of the agency investigation whenever the whistleblower consents to the disclosure of his name.

In the event it is not possible to report on the matter within the 60-day time limit under the statute, you may request in writing an extension of time not to exceed 60 days. Please be advised

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<sup>1</sup> Mr. Castillo believes but cannot confirm that "Briglia" is the correct spelling.

The Honorable Elaine L. Chao  
Page 3

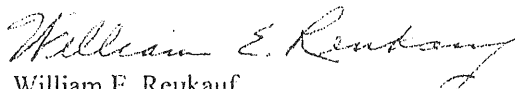
that an extension of time is normally not granted automatically, but only upon a showing of good cause. Accordingly, in the written request for an extension of time, please state specifically the reasons the additional time is needed. Any additional requests for an extension of time must be approved by me.

After making the determinations required by 5 U.S.C. § 1213(e)(2), copies of the report, along with any comments on the report from the whistleblower, and any comments or recommendations by this office will be sent to the President and the appropriate oversight committees in the Senate and House of Representatives. 5 U.S.C. § 1213(e)(3).

Unless classified or prohibited from release by law or by Executive Order requiring that the information be kept secret in the interest of national defense or the conduct of foreign affairs, a copy of the report and any comments will be placed in a public file in accordance with 5 U.S.C. § 1219(a).

Please refer to our file number in any correspondence on this matter. If you need further information, please contact Catherine A. McMullen, Chief, Disclosure Unit, at (202) 254-3604. I am also available for any questions you may have.

Sincerely,

  
William E. Reukauf  
Acting Special Counsel

Enclosures

Enclosure

Requirements of 5 U.S.C. § 1213(d)

Any report required under subsection (c) shall be reviewed and signed by the head of the agency<sup>1</sup> and shall include:

- (1) a summary of the information with respect to which the investigation was initiated;
- (2) a description of the conduct of the investigation;
- (3) a summary of any evidence obtained from the investigation;
- (4) a listing of any violation or apparent violation of law, rule or regulation; and
- (5) a description of any action taken or planned as a result of the investigation, such as:
  - (A) changes in agency rules, regulations or practices;
  - (B) the restoration of any aggrieved employee;
  - (C) disciplinary action against any employee; and
  - (D) referral to the Attorney General of any evidence of criminal violation.

In addition, we are interested in learning of any dollar savings, or projected savings, and any management initiatives that may result from this review.

---

<sup>1</sup> Should you decide to delegate authority to another official to review and sign the report, your delegation must be specifically stated.



NYLIM Retirement Plan Services  
690 Canton Street  
Westwood, MA 02090  
T 781 519-2000 F 781 519-2296

Mr. Jose Castillo  
U.S. Department of Labor  
Employee Benefit Security Administration  
33 Whitehall St.  
Suite 1200  
New York, N.Y. 10004

October 30, 2006

Re: The Asbestos Workers Local 12 Annuity Fund

Dear Jose:

Per your written request of 10/06/05 to Mike Hession, please find enclosed copies of the information you requested.

If you have any future requests for information they should also be directed to:

Mike Hession  
New York Life Investment Management LLC  
Office of the General Counsel  
169 Lackawanna Avenue  
Parsippany, NJ 07054  
Phone: (973) 394-4433  
Fax: (973) 394-4637

If you have any questions regarding this letter please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Dale Powers". The signature is written in a cursive, flowing style.

Dale Powers  
Second Vice President  
New York Life Investment Management LLC  
Compliance Department



Local #12  
ASBESTOS WORKERS EMPLOYEE BENEFIT FUNDS  
New York City

Welfare  
Pension  
Vacation  
Annuity  
AJEF



Al Wassell  
Fund Manager

September 26, 2001

Dear John:

Please make note the amount of unallocated earnings, approximately \$380,000.00, from the year 2000 will be used to offset the upcoming contribution transfer for the period from January to May 2001. Thank you for your cooperation. If you have any questions please call me at 718-784-8883.

Sincerely,

A handwritten signature in cursive script that reads "Al Wassell".

Al Wassell  
Fund Manager

## FUNDING REQUEST FORM

## THE ASBESTOS WORKERS LOCAL 12 ANNUITY FUND

Today's Date: 10/19/2001

Payroll Period End Date: 06/01/2001

- I. Please verify the figures below with your records. If there are any discrepancies, please contact New York Life Benefit Services, Inc. immediately.
- II. Please wire the following amounts on behalf of your plan:

|                          |                       |
|--------------------------|-----------------------|
| Anty Contr, Cont.:       | \$1,555,604.77        |
| Prefunded Contributions: | ( \$381,099.30)       |
| <b>Total</b>             | <b>\$1,174,505.47</b> |

By wiring these funds you are confirming the integrity of the data processed.

Wiring Instructions: State Street Bank  
ABA#: \\  
Account Number:  
Reference #:

All unidentified wires will be returned. Therefore, please include the above reference number as part of the wiring instructions.

NOTE: Each time a funding request form is generated, the reference number changes. As a result, each time you initiate a wire, you must revise the wire instructions.

UPDATED

U.S. Department of Labor



FEB - 2 2009

William E. Reukauf  
Acting Special Counsel  
Office of Special Counsel  
1730 M Street, N.W.  
Washington, D.C. 20036-4505

Attention: Catherine A. McMullen

Dear Mr. Reukauf:

I am in receipt of your letter of January 9 regarding PSC File No. DI-08-3066. As Acting Secretary, I have asked the Department's Inspector General to complete the mandated investigation consistently with his mission and authorities and to prepare a report for review by the incoming Secretary. In order to assist the Inspector General in completing an investigation under the provisions of 5 U.S.C. 1213 that is as thorough and conclusive as possible, please provide directly to the Office of the Inspector General, subject to applicable laws, whatever evidence you or your office considered in concluding "that there is a substantial likelihood that the information provided by the whistleblower discloses an abuse of authority."

Please direct responsive materials and any related questions to:

Howard Shapiro  
Counsel to the Inspector General  
U.S. Department of Labor  
Room S-5506  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

(202) 693-5116

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Ed Hugler". The signature is written in a cursive, somewhat stylized font.

Edward C. Hugler  
Acting Secretary of Labor


2

# Report of Interview

## U.S. Department of Labor Office of Inspector General



OIG Form 103 (OI-6/08)

|                 |               |              |                                                                                                   |                |                |
|-----------------|---------------|--------------|---------------------------------------------------------------------------------------------------|----------------|----------------|
| Interview Date: | April 7, 2009 | Location:    | EBSA 33 Whitehall Street, New York, NY                                                            | Case Number:   | 14-2601-0004IA |
| Subject:        | Jose Castillo | Prepared By: | Robert W. Wyche  | Date Prepared: | April 14, 2009 |

On April 7, 2009, Assistant Inspector General (AIG) Asa Cunningham and I interviewed Jose Castillo at the Employee Benefits Security Administration (EBSA), New York Regional Office (RO), United States Department of Labor (DOL), 33 Whitehall Street, Suite 1200, New York, New York. Prior to the interview, AIG Cunningham and I identified ourselves and obtained the following personal information:

Name: Jose Castillo

DOB:

Home

Address:

Home Telephone:

Work Telephone:

EOD Date:

Title:

Years in

Current Position:

This is the third time in this investigation Mr. Castillo has been interviewed, the first interview taking place on February 12 - 13, 2009 and the second March 12, 2009. Mr. Castillo was given a Garity warning at the onset of the interview, which he read and signed, agreeing to answer questions in this investigation.

In reviewing previous interviews conducted with Mr. Castillo, discrepancies were noted involving the investigative issues in the Asbestos Workers Local 12 Funds investigation Mr. Castillo identified as being criminal violations and when the alleged criminal violations occurred. Discrepancies also existed in Mr. Castillo's previous statements regarding conversations he reported having with various supervisors and exactly when these conversations took place.

In an attempt to clarify these discrepancies, Mr. Castillo provided the following timeline outlining specific events in the Asbestos Workers Local 12 Funds investigation and their correlation to individuals named by Mr. Castillo in his allegations.

### February 2002

- Mr. Castillo was first assigned the Asbestos Workers Local 12 investigation by his supervisor Jonathan Brown, Supervisory Investigator (retired), EBSA, New York RO, DOL.

### May 3, 2005

- Mr. Castillo sent a voluntary compliance (VC) letter to the Asbestos Workers Local 12 Union trustees.

### October 2005

- Robert Goldberg, Senior Investigator, EBSA, New York RO, DOL, was appointed as Mr. Castillo's acting supervisor after the retirement of Mr. Brown. This assignment was part of a rotational acting supervisor assignment implemented by Regional Director Jonathan Kay, EBSA, New York RO, DOL until a replacement was named for Mr. Brown.

### November 2005

- Mr. Castillo received a letter from Mr. [REDACTED], Asbestos Workers Local 12 Union member (retired) alleging he was "shortchanged" on his year 2000 investment earnings.
- In reviewing this letter, Mr. Castillo identified \$1.8 million in the Asbestos Workers Local 12 Annuity Funds year 2000 earnings that was not allocated to the Annuity Fund's participants.
- Mr. Castillo met with his acting supervisor Mr. Goldberg and told him it looked like the Asbestos Workers Local 12 Annuity Fund had been "hijacked" and that the union accountants were lying by reporting a shortfall in the Annuity Fund. Mr. Castillo reported that Mr. Goldberg made no response and just walked away from him.

### November 7, 2005

- The first settlement meeting was held between EBSA New York RO and the Asbestos Workers Local 12 Union trustees, accountants and attorneys.

- Mr. Goldberg refused to look at Mr. Castillo's documents prior to the settlement meeting, which according to Mr. Castillo, proved a criminal violation existed.
- Mr. Goldberg questioned the validity of the issues presented in the VC letter by Mr. Castillo and refused to address the alleged criminal issues.

#### **January 9, 2006**

- The second settlement meeting was held between EBSA New York RO and the Asbestos Workers Local 12 Union trustees, accountants and attorneys.
- Mr. Goldberg wanted to eliminate all of the accounting issues in the VC letter due to a lack of solid evidence.

#### **January 30, 2006**

- The third settlement meeting was held between EBSA New York RO and the Asbestos Workers Local 12 Union trustees, accountants and attorneys.
- Mr. Goldberg was still questioning the validity of Mr. Castillo's investigative findings.

#### **February 1, 2006**

- Nichelle Langone, Senior Investigator, EBSA, New York RO, DOL replaced Mr. Goldberg as Mr. Castillo's acting supervisor. Regional Director Kay kept Mr. Goldberg as Mr. Castillo's supervisor on the Asbestos Workers Local 12 Funds investigation.

#### **March 31, 2006**

- Mr. Castillo met with Regional Director Kay and voiced complaints about keeping Mr. Goldberg as his supervisor on the Asbestos Workers Local 12 Funds investigation.
- Mr. Goldberg made facial gestures behind Mr. Castillo's back during a settlement meeting.

#### April 11, 2006

- Regional Director Kay instructed Deputy Director Jeffrey Gaynor (retired), EBSA, New York RO, DOL, to become involved in the Asbestos Workers Local 12 Funds investigation.
- Mr. Castillo gave Deputy Director Gaynor all of his documents relating to the Asbestos Workers Local 12 Funds investigation but claims Deputy Director Gaynor never reviewed them.

#### June 14, 2006

- Mr. Castillo met with James Heinzman, CPA, Schultheis and Panettieri, the accounting firm representing the Asbestos Workers Local 12 Union, to discuss the VC letter.

#### October 2006

- Mr. Castillo identified \$381,000 in the Asbestos Workers Local 12 Union Annuity Fund that was used as employer contributions instead of going to the Annuity Fund participants.
- Mr. Castillo confirmed that the criminal statute of limitations associated with this violation had already expired prior to Mr. Castillo discovering the violation.

#### November 3, 2006

- Mr. Castillo met with Mr. Heinzman, to again discuss issues identified in the VC letter.

#### November 2006

- Mr. Castillo received an e-mail from Regional Director Kay advising him not to contact anyone involved in the Asbestos Workers Local 12 Funds investigation without approval from Mr. Goldberg or Deputy Director Gaynor.

#### January 2007

- Mr. Castillo reviewed the Asbestos Workers Local 12 Funds investigation with Michael Briglia, Senior Investigator, EBSA, New York Region, DOL. Mr. Briglia was temporarily appointed as acting supervisor, while Ms. Langone was out of



the office for a short period of time.

- Mr. Castillo stated Mr. Briglia agreed with his investigative findings and also felt that criminal violations existed.
- Mr. Castillo stated that Mr. Briglia spoke with him the next day and told him he could not discuss the Asbestos Workers Local 12 Funds investigation with him anymore.

#### **March 6, 2007**

- Mr. Castillo met with Mr. Heinzman, and discussed Mr. Castillo's claim that \$381,000 in the Asbestos Workers Local 12 Union Annuity Fund had been used as employer contributions instead of going to the Annuity Fund participants.

#### **May 4, 2007**

- Mr. Castillo submitted the Report of Investigation (ROI) for Part 1 of the Asbestos Workers Local 12 Funds investigation to the Office of the Solicitor (SOL), EBSA, New York Region, DOL. Regional Director Kay made the decision to divide the Asbestos Workers Local 12 Funds investigation into two parts; Part 1 consisting of civil issues and Part 2 consisting of four remaining issues in the investigation, which are still unresolved at this time by EBSA and SOL.

#### **September 2007**

- Jeffrey Monhart, Chief, Division of Field Operations, Office of Enforcement, EBSA, DOL, Washington, DC, was temporarily detailed to EBSA New York Region as the Acting Deputy Director after Deputy Director Gaynor retired.
- Mr. Castillo advised that Acting Deputy Director Monhart wanted him to obtain a deposition from Mr. Heinzman; however, Regional Director Kay directed him to conduct a telephonic interview with Mr. Heinzman instead. The purpose of the interview was to determine the accounting firm Schultheis and Panettieri's position on the issues in Part 2 of the Asbestos Workers Local 12 Funds investigation.

### December 3, 2007

- Mr. Castillo submitted the ROI for Part 2 of the Asbestos Workers Local 12 Funds investigation to SOL, which contained the following four issues:
  1. During the 2000 to 2001 plan year, approximately \$381,000 in Asbestos Workers Annuity Fund earnings was paid out of the Fund without documentation or written explanation. Mr. Castillo further alleges that the \$381,000 of the Asbestos Workers Local 12 Annuity Fund's investment earnings was used by the Asbestos Workers Local 12 Plan Administrator as employer contributions instead of being allocated to the fund participants.
  2. The Asbestos Workers Local 12 Annuity Fund's earnings for calendar year (CY) 2000 (totaling approximately \$1.8 million) were not allocated to individual participant accounts, even though the Fund appears to have had more than sufficient assets to cover all participant account balances and to meet its other obligations.
  3. Employer contributions forwarded to the Asbestos Workers Local 12 Annuity Fund investment account in three separate transactions on October 19, 2001, January 28, 2002 and May 2, 2002 may have been insufficient to cover the amounts due according to the remittance reports for the corresponding period of time.
  4. In three separate transactions on June 6, 2001, November 20, 2001 and January 8, 2002, a total of approximately \$1,237,000 in Asbestos Workers Local 12 Welfare Plan assets was transferred to the Asbestos Workers Local 12 Annuity Fund without sufficient documentation or explanation.

### January 24, 2008

- Mr. Castillo first met with Jennifer Weekley, Attorney, New York Region, SOL to discuss Part 2 of the Asbestos Workers Local 12 Funds investigation.
- Mr. Castillo reported that Ms. Weekley did not agree with all of his investigative findings regarding Part 2 of the Asbestos Workers Local 12 Funds investigation.

### April 2008

- A settlement was reached between EBSA, SOL and the Asbestos Workers Local 12 Union for Part 1 of the investigation.
- Regional Director Kay solicited an opinion from the Office of Regulation and Interpretation, DOL, Washington, DC regarding issues one and two of the Asbestos Workers Local 12 Funds investigation

### May 2008

- Mr. Castillo was excluded from a meeting at SOL by Patricia Rodenhausen, Regional Solicitor of Labor (RSOL), New York Region, DOL. This meeting was attended by EBSA managers, SOL attorneys and accountants, lawyers and trustees representing the Asbestos Workers Local 12 Union.

### July 31, 2008

- Mr. Castillo was excluded from another meeting at SOL to discuss issues in Part 2 of the Asbestos Workers Local 12 Funds investigation.

### December 2008

- Regional Director Kay asked the Office of the Chief Accountant (OCA), EBSA, DOL, Washington, DC to render an opinion as to whether loan receivables are considered planned assets.

As of this date, Mr. Castillo is still attempting to gather additional evidence to prove civil violations exist with issues three and four in Part 2 of the Asbestos Workers Local 12 Funds investigation. Mr. Castillo stated he has not been advised of the status of OCA's opinion in response to the question as to whether loan receivables are considered planned assets.

When questioned further about then Acting Deputy Director Monhart's involvement in the Asbestos Workers Local 12 Funds investigation, Mr. Castillo advised that he was supportive of him and that it was Acting Deputy Director Monhart's idea to depose Mr. Heinzman and have him explain the discrepancies in the accounting reported by Schultheis and Panettieri. According to Mr. Castillo, Regional Director Kay, unknown to Acting Deputy Director Monhart, disapproved of this idea and directed Mr. Castillo to "just interview him."

Mr. Castillo admitted that he never discussed with Regional Director Kay that the Asbestos Workers Local 12 Funds investigation possibly contained criminal violations. Mr. Castillo's reason was that it was EBSA's protocol to discuss investigative matters with ones immediate supervisor, which in this case was Mr. Goldberg.

Mr. Castillo maintains that Regional Director Kay delayed and stalled the Asbestos Workers Local 12 Funds investigation by keeping Mr. Goldberg assigned as Mr. Castillo's supervisor for this investigation. Mr. Castillo believes that if Regional Director Kay had kept the investigation under Ms. Langone's supervision when she was named as his acting supervisor, Ms. Langone would have agreed to pursue the criminal violations.

Mr. Castillo feels that Regional Director Kay does not like him and chose the Asbestos Workers Local 12 Funds investigation to make him look bad due to the many issues involved in the investigation. This allowed Mr. Kay to easily manipulate and delay the investigation. According to Mr. Castillo, all of the other investigations assigned to him have been settled quickly without issues.

Mr. Castillo also asserts that Regional Director Kay influenced his wife RSOL Rodenhausen to cause delays from SOL, New York Region, by having SOL attorneys disagree with his investigative findings. In conclusion, Mr. Castillo also believes that Regional Director Kay has a close relationship with Sherwin Kaplan, Attorney, (representing the accounting firm of Schultheis and Panettieri), resulting from Mr. Kaplans previous employment with EBSA, DOL, in Washington, DC. Due to this assumed relationship, Mr. Castillo feels that Mr. Kay has been influenced by Mr. Kaplan in some way to purposely cause delays in the investigation.

At the conclusion of the interview, Mr. Castillo provided a sworn written statement regarding the facts discussed during this interview and both previous interviews.

AFFIDAVIT

City: New York

Date: 4/9/09

State: NY

Time: 5:30 P.M

JOSE B. CASTILLO

, being duly sworn, deposes and states:

*[A large diagonal line is drawn across the page, indicating that the deponent has nothing to say.]*

*JK*  
*4/9/09*

Case Number: 14-2601-0004JA Page 1 of 26 Deponent's Initials

OIG 118A (OLRFI 9/05)

*PAGE 1*  
*JK*

My Statements to the Office of the Inspector General, US Department of Labor

This statement was provided to Gene Cunningham, Assistant Inspector General and Robert W. Wyche, Assistant Special Agent in Charge of the Office of Inspections & Special Investigations, Office of Inspector General, US Department of Labor on February 12, 13, March 12 and April 7, 2009 pursuant to my complaint filed with the U.S. Office of Special Counsel alleging that the following Department of Labor employee abuse their authority and hindered my investigation of Local 12 Funds to cover the fraud committed by the trustees:

Jonathan Kay, Regional Director, Employee Benefits Security Administration;  
The following is the summary of his actions:

Assigned Robert Goldberg to function as my special supervisor. He in turn, did all kinds of actions listed below to execute the goal of Jonathan Kay. He assigned Deputy Gaynor to function as another special supervisor to also unnecessarily hinder the progress of my investigation. He did not allow me to communicate with the parties concerned without the approval of either Goldberg or Gaynor. He disapproved my plan to depose the auditor who did the "creative accounting" to fraudulently show the short fall. He excluded me from any settlement meeting conducted by the Solicitor of Labor with trustees' counsels falsely claiming that I disrespected the SOL. He called the legal assistance of the Fund's financial custodian (NYL) and obtained a completely unsubstantiated data in his relentless effort to contradict my documented data. And finally, obtained some kind of comments or determination from the Office of the Chief Accountant (OCA) that is absolutely undocumented and solely based on theories to contradict my documented findings.

Jeffrey Gaynor, Deputy Director, Employee Benefits Security Administration;  
His involvement as the additional special supervisor started as soon as I brought to the attention of Jonathan Kay the questionable gestures of Goldberg that I saw and receipt of the April 2006 letter of collaborating it. On the day he became involved he immediately asked me to provide him with a written analysis of the status of the eleven issues cited on the VC letter. This is purely designed to hinder my investigation because Kay and Goldberg know that nothing can be written about it. The trustees' counsels so far only provided me with verbal presentation instead of documentation. He partnered with Goldberg to strongly disagree with my findings and never reviewed the accounting evidence I already obtained on the issue.

Robert Goldberg, assigned by Jonathan Kay as my "special supervisor";  
On the pretext of acting as my supervisor and supposedly to assist me, he executed the goal of Jonathan Kay to hinder and undermine my investigation. He made highly questionable gestures while I was rebutting the statements of the trustees' counsels. He denied receiving the November 1, 2005 letter of to the EEO investigator. He discredited the validity of all the auditing/accounting fee issues on the VC letter that was properly issued in accordance with Chapter 34 of the EBSA Enforcement Manual and

X 2  
JK

signed by Kay. He ignored the information I gave him that the 2000 investment earning was never allocated. He completely disagreed with my findings without reviewing my evidence. He fielded prearranged questions to the auditor during the July 31, 2008 **staged** discussion attended by Jennifer Weekley of the SOL and the auditor and trustees' counsels.

Jennifer Weekley, ERISA trail lawyer, Solicitor of Labor, New York; She executed the goal of Jonathan Kay by floating the idea that loan receivable can be considered NOT plan asset during our January 2008 meeting. She agreed to the wishes of Jonathan Kay's wife, Patricia Rodenhausen to stage the July 31, 2008 discussion with the trustees' counsels without my presence. Ms. Weekley successfully obtained either consent judgments or settlement agreement with a number of cases I investigated. During all the settlement meetings and court hearings, I was always present and my supervisor' attendance not really necessary. These were eight cases involving Local 2682, Local 456 and Local 1175 Funds.

\*Patricia Rodenhausen, Regional Solicitor of Labor, New York,

\*Ms. Rodenhausen is the wife of Jonathan Kay.

Jonathan Kay, before working for EBSA, was an ERISA trial lawyer for the Regional SOL working for his now wife.

She agreed to Jonathan Kay's effort to hinder my investigation and cover the fraud by letting Jennifer Weekley staged the July 31, 2008 discussion with the trustees' counsels and the auditor without my presence. Her action aided the effort of Jonathan Kay to prevent me from questioning the auditor.

I started the investigation of Local 12 Funds in February 2002 under the supervision of Jonathan Brown. On May 3, 2005 a voluntary compliance (VC) letter was issued to the trustees of the Funds. The purpose of the VC letter is to explain the ERISA violations discovered to the trustees. The letter was approved and signed by Jonathan Kay, the regional director (RD) of the Employee Benefits Security Administration (EBSA), New York Regional Office (**Attach-1**). \*As required, the violations stated on the VC letters are **fully documented** and that the position taken in the voluntary compliance notice letter is appropriate. This is in compliance with EBSA Enforcement Manual, Chapter 34.

In one occasion about two weeks after the VC letter was issued, I was present at my supervisor's office while he was talking on the phone to Sherwin Kaplan of the DC based law firm Thelen Reid Brown Raysman & Steiner. The law firm we found out is representing Schultheis & Panettieri, LLP (S&P), the Long Island accounting firm that according to my investigation, charged the Funds fees that are undocumented. Later, my report of investigation, Part II shows that this accounting firm created the special project to show that there is a short fall of Fund's asset as of December 31, 2000.

\* A "short fall" means that the Net assets available for benefit is less than the total participants account balance.

56 \* 3

In October 2005, Robert Goldberg became acting supervisor due to the retirement of Jonathan Brown. Goldberg was one of the three senior investigators selected by management to function as acting supervisor of my group on a rotating basis. He was in my group that was under the supervision of Brown.

In morning of November 3 or 4, 2005, Goldberg gave me a letter dated Nov. 1, 2005 (**Attach-2**) from participant . His letter alleges that the year 2000 investment earning he received from the Annuity Fund is much less than what he is entitled to. I immediately looked into his allegation by reviewing the documents that are attached to his letter. Also, I reviewed the following six (6) documents that are already in my possession.

- a) The year 1999 and 2000 financial statements of the Annuity Fund;
  - b) The Annuity Fund plan document;
  - c) Report of Interview of James Heinzman of S & P dated 11/10/2004;
  - d) Annuity Fund Interest Allocation Analysis dated September 28, 2001;
  - e) Audit work papers completed in July 2001 for the Annuity Fund's financial statements for 2000;
  - f) The year 2001 financial statements of the Annuity Fund.
- 

My review of the documents listed above disclosed that the trustees violated ERISA Act. Sec 404(a)(1)(D) and the Fund's plan document by not apportioning the investment earning for year 2000 as required. There is no short fall of plan asset as of December 31, 2000 compared to the total participant account balance. The 2000 and 2001 financial statements and the audit work papers for 2000 of James Heinzman of S & P show no short fall.

The Report of Interview on James Heinzman dated 11/10/2004 shows that he did **not disclosed** to the investigators the special project called "**Litigation & Re-Allocation Analysis**" dated April 26, 2004 was done. The Schroeder letter shows that some sort of a meeting was held on April 26, 2004 and followed by the June 22, 2004 meeting with the fund accountant (Heinzman). The purpose of the meetings was to provide an explanation to Schroeder about this special project.

Participant's allegation that he received his share of the 2000 investment earning in **August 30, 2004 instead of in 2001** and the amount is much lower than what he should be entitled to are **huge red flags**. Enclosure # 1 on his letter shows he received \$5,873.48 and the data from 1993 to 1999 if combined shows the so called short fall. However, the financial **statements for 1999, 2000 and 2001 do not show that.**

\* Act. Sec. 404 (a) (1) (D) states:

Subject to sections 403 (c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and-

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1/2



(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and Title IV.

It was my determination at this time a possible criminal financial fraud occurred. **As criminal violation, the facts reflected above show possible violation of 18 U.S.C. Section 664 (amended in 1974), Theft from Employee Benefit Plan or Connected Fund.** Under a routine situation, a parallel criminal investigation would have been started.

Note # 8 (Interest distribution to members) of the 2000 financial statements on page 11 plainly and clearly states, **“The Plan distributes to the participants’ accounts the approximate net earnings of the Plan at the each of each year. No earnings were allocated for the year ended December 31, 2000”.**

Note # 9 clearly states, Participants’ accounts reconciled to net assets available for benefits as of December 31, 2000.

Article Four –Accounting Rules, page 7, Sec. 4.1 ( c ) of the plan document states:

“Allocation of Investment Experience: As of each Valuation Date, the investment fund(s) of the Trust shall be valued at fair market value, and the income, loss, appreciation and depreciation (realized and unrealized), and any paid expenses of the Trust attributed to such fund shall be apportioned among Participants ‘Accounts within the fund based upon the value of each Account within the fund as of the preceding Valuation Date.”

:  
Interest Allocation Analysis dated Sep. 28, 2001 shows the Fund as having a “shortfall” of \$1,900,309.00. However, the financial statements for 1999, 2000 and 2001 (a) above do not reflect the \$1,900,309.00 shortfall.

Jonathan Kay is a lawyer who is already working for EBSA doing ERISA work when I first started with this agency in May 1998. Since becoming an Auditor/Investigator in September 1999, **I, alone** completed investigation of 54 civil cases. The great majority of these cases have Art. Sec. 404(a)(1)(D) violations. Prior to the successful conclusion of these cases, either voluntary compliance (VC) letters and/or Report of Investigations (ROI) were issued. Since I started as an Auditor/Investigator, Jonathan Kay is always the person who signs and approves these VCs or approves and endorses ROIs. There are approximately 35 Investigators in this agency.

I do not believe, for a single minute, that if the plan document of Local 12 Annuity Fund was **only reviewed by** Goldberg and ultimately by Jonathan Kay back in November 2005, that they **would not** recognized that, the failure of the trustees to follow the plan and not allocate the \$49,497,552 Net Assets available for benefits as required is a **serious violation**. However, since the main goal was to purposely overlook the violation, Goldberg never bothered to review the plan document at this time. Instead, he made a concerted effort to question the validity of my findings as presented on the VC letter.

W \* 5

Review of \_\_\_\_\_'s attached documents appears to show that his Individual Account is adjusted (reduced) according to the Article Four, Sec. 4.2 (b). However, this account statement appears to be created by S & P and not by New York Life, the record keeper. A statement (Encl. #4) obtained on-line by him shows no reducing entry. Later, he explained to me on the phone that the 6/21/2001 starting balance of \$382,689.23 does not include the supposed adjustment, instead the adjustment was done 8/30/2004.

Jonathan Kay's main goal during this time was to somehow demonstrate that the findings' evidence presented on the VC letter is not satisfactory. When I made the discovery that the investment earning for 2000 was not apportioned as required, he made the decision to again determine that this newest finding's evidence is not satisfactory without the benefit of being reviewed by Goldberg and later by Gaynor.

Later, to justify his decision to dismiss my latest finding, he made written statements to the EEO Investigator in response to my complaint. These statements were made on 11/17/2006 (**Attach-3**, pages 8-10). Below are some of his statements and my comments:

- a) In my view, Mr. Castillo's performance in the five Local 12 cases was slow, the evidence not properly developed and he did not demonstrate sufficient objectivity;

\*As per EBSA Enforcement Manual, Chapter 34, the issues on the VC letter dated 5/3/2005 were fully documented. During this period, I was also actively investigating Local 427 and Local 1175 cases that have ongoing parallel criminal investigations.

Local 1175 Funds, three cases, opened 8/18/2003, closed 9/18/2008  
Resulted in a consent judgment from a federal court  
I was informed at the start that the above has ties to organized crime.

Local 427 Funds, two cases, opened 1/15/2004, closed 9/11/2007  
Resulted in a settlement agreed by the SOL and trustees' counsels

- b) It is my view that Mr. Castillo has prematurely reached conclusions that violations have occurred without gathering sufficient evidence, Specifically, he has not determined whether the investigative subject has a valid explanation for accounting charges that seem excessive and for whether investment earnings were deposited in the Local Benefit Funds' accounts;

\* Kay indicated that I prematurely reached conclusions that violations have occurred without gathering sufficient evidence. He seems to want me to accept the verbal explanations of counsels without any document as the additional evidence to support its validity.

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Note, ultimately, a settlement was reached on the issues of the VC letter. Not a single page was presented by the trustees to contradict my findings. This proves without a doubt that Kay's alibis stated above were all false.

Under a routine situation, a parallel criminal investigation would have been started immediately because;

First, the amount **involved that was not possibly allocated is huge (\$1.8M)**. As far as I know, EBSA will vigorously pursue criminal investigation of possible fraud against ERISA plan in the amount as low as \$50 k.

Second, S & P auditors completed this previously undisclosed Litigation and Re-Allocation Analysis that shows the misallocation and charged the Funds huge number of undocumented hour charges of auditing and accounting fees according to my VC letter.

Third, the individual statement that was provided to \_\_\_\_\_ was not created by New York Life; instead it was mailed from the Fund office and received by him after the April 26, 2004 meeting. Any statement should be coming from the record keeper which is NYL.

Fourth, it is clear, the plan document was not followed as required under ERISA Sec. 404 (a) (1) (D).

Fifth, if in fact there was an actual short fall, how come the Individual Accounts were not adjusted immediately as required by Article Four, Sec. 4.2 (b) of the plan document? Instead the participants were told that the adjustment was done 8/30/2004.

Subsequent findings that are the results of my investigation going forward, found strong evidence of a **huge financial fraud**. These findings would have been also discovered by the designated criminal investigation but more easily, much earlier and in its entirety. I would have provided my initial evidence to some of the issues to this investigator as standard procedure. These findings are as follows:

1) The discovery in April of 2007 that **\$1,401,997.00 cash** that was previously with the Bank of New York until at least December 31, 2001 is **unaccounted for**. The Fund's assets of \$43,062,710.42 in securities and \$1,063,890.55 cash in the Mainstay Money Market were transferred from this bank to New York Life August 2000. On papers, it appears that this was the complete transfer of Fund's assets. However, my subsequent review of the audit work papers and financial (trust) statements from New York Life disclosed no transaction trail to follow where this cash ended up. In theory, it should have been transferred to New York Life. However, review of the 2002 trust statement and additional reviews of all the yearly trust statements from 2000 to 2004 does not show any indication that this cash was transferred to New York Life. I had to cut short my investigation of this issue due to time constrain. Also, there is no more reason for me to pursue this since the statute already expired at the time of my discovery. If a criminal investigation was started back in November 2005, there

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would have been more than enough time for the discovery and to fully develop it. In my determination, the possible crime occurred at least in the beginning of 2002 when this cash became unaccounted for.

2) The discovery in December of 2008 \*that the special project called the "Annuity Fund Interest Allocation Analysis dated September 28, 2001" used, in my determination, financial data that are improper. The data used was from the Form 5500s instead of the financial statements from 1993 to 1999. As a result, the project is showing the claimed **short fall of \$1,900,309.00 that can not be documented.**

This project and the previously undisclosed project called the "Litigation and Re-Allocation Analysis dated April 24, 2004" were designed to show the short fall and to **mask** the allocation of the settlement funds in August 30, 2004 as the allocation of the 2000 investment earning. As shown on my ROI, Part II, Heinzman himself admitted during interview, that the transaction trail of the allocation of the investments earning for 2000 in August of 2004 is actually the transaction trail of the allocation of the settlement payments.

All along, trustees always maintained that this special project is valid and all along Goldberg and Jonathan Kay seems to agree and would like me to consider this also as valid.

3) The discovery in the middle of 2006 that \* **\$823,368.31** was taken out from an unknown source 1/3/2000 and deposited into the Annuity Fund's account with Fleet Bank No. . . . . This money was put into the Fund's account by overnight investment sweep transaction and ultimately disbursed by the end of February 2000. No further investigation was done on this because the investigator needed to concentrate of the allocation issue. However, if there was a criminal investigation started, the designated criminal investigator would have figured out what happen to this money and where it came from.

\* Goldberg was fully made aware of this.

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Sometimes during the day, a few hours after he handed to me the letter, I told him " it's looks like . . . did not received the year 2000 investment earnings and it's "**hijacked**". Goldberg simply ignored what I said.

The 2000 Annuity Fund investment earning that was not apportioned as required to the 500 participants because the trustees did not allocate the Net Asset Available for Benefits of \$49,497,552 is at least \$1.8 million. About one and a half years ago, a \*CPA co-worker investigator computed the accumulated running interest due and the came up with a total of about **\$4 million.**

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November 7, 2005 – first settlement meeting was held with the trustees' counsels and the trustees. It was during this meeting that I thought I accidentally saw Goldberg looking at the ceiling, sort of shaking his head and seems rolling his eyes when I slightly turned to my left as I grabbed a document. He was seated behind me but more to my left. He was seating slightly behind Bob Trujillo, the investigator that assisted me on the Local 12 Funds cases. Bob Trujillo was also behind me but more to my right.

During this meeting, I mentioned to counsels and trustees that the Department recently received a written complaint from a participant concerning his investment earnings for 2000. I actually held the letter up front as I spoke.

Initially, the three of us, (Goldberg, Trujillo and me) agreed not to address in detail the issues stated on the VC letter. However, during the meeting, the counsels decided to discuss the issues in detailed. It was not a productive meeting. After the meeting, I witnessed Counsel Denis Engel called Bob Goldberg for talk inside the conference room. Bob Trujillo and I were not invited.

The purpose of this meeting as originally planned was not to discuss the issues on the VC letter dated May 3, 2005 in detail. Before the meeting, we (Goldberg, Trujillo and me) agreed to the plan. However, at the start of the meeting, trustees' counsel Denis Engel started disputing the issues in detail. Goldberg did not object to the insistence of Engel to discuss issue for issue in detail. This meeting lasted almost the whole morning and it was not productive. The few documents (bank statements) they brought and tried to convince me that it will resolve the issues of undocumented audit fees do not make sense.

January 9, 2006 – another settlement meeting took place. The conference room on 12<sup>th</sup> Floor was used. Before the meeting, Goldberg and I agreed that we will not engage in the discussion of the issues on the VC in detail. Bob Trujillo was transferred to the Chicago office. At this meeting, counsels (Kaplan) for Schultheis and Panettieri and James Heinzman, the accountant were present.

On the other half of the conference room, the Benefits Advisors also have a meeting. Again, counsels decided to discuss the issues in detail and Goldberg let them do it. Again, counsels do not have the documents I requested they produce to resolve the issues of undocumented accounting charges. I was forced to defend the position of the agency as stated on the VC letter. I did all the talking and rebuttals. Goldberg only spoke once and this time to disagree with my statements. The Benefits Advisors next door heard the proceedings and anyone of them can testify that they only heard me doing all the talking. After the meeting Goldberg stated to me that with the exception of a couple of issues, all the S & P accounting issues should be eliminated.

In the week of January 23 thru 27, in one of these days, I spoke to Goldberg about Local 12 Funds. There was a scheduled settlement meeting January 30, 2006. We specifically discussed the issues on the VC letter. I stated to him that the two accounting issues involved statements of James Heinzman when I interviewed him. On our January 9, 2006

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meeting, Heinzman is completely changing his stories. Goldberg stated to me that Heinzman just misunderstood me during the interviews. At this point, Goldberg had not seen the Report of Interviews of James Heinzman.

Also, Goldberg has not review my evidence concerning undocumented auditing/accounting fee issues at this time.

January 30, 2006, another settlement meeting was held. Again, nothing was accomplished since counsels did not produce the documents requested. Again, they engaged me in the discussion of the issues without the documents to resolve it. After the meeting Goldberg stated to me that the evidence on most of the issues concerning S & P maybe **flimsy**. He stated this without reviewing my documented evidence and with the trustees counsels not providing us with the documents to resolve these accounting issues. Again, this settlement meeting was unproductive. Heinzman and his counsel Mr.Kaplan were present.

Effective February 1, 2006, Nichelle Langone became my supervisor; however, she was not allowed to be my supervisor on Local 12 Fund cases. Goldberg was assigned to be the supervisor of another group; however, he continued to be my supervisor on Local 12 Fund cases.

Jonathan Kay explanation to me about this arrangement was that the issues on Local 12 Funds would be too complicated for \*Ms. Langone to understand.

\*Ms. Langone told me early January 2009 that the reason provided to her by Jonathan Kay was the Goldberg was retained as my supervisor on Local 12 Funds because he already attended a number of settlement meetings with the trustees and counsels.

I have been an investigator for almost ten year now. I have not heard or know of this arrangement where an investigator that was transferred to another group continued to be supervised by his or her former supervisor on some of his or her cases because this former supervisor already attended settlement meetings on these cases.

On the afternoon of March 31, 2006, I stated to the RD that I though I saw Goldberg making questionable gestures during the settlement meeting on November 7, 2005 with Local 12 Funds trustees and counsels.

April 3, 2006, I received a faxed letter from . The letter is questioning the professionalism of the ongoing investigation. He claimed that one of the trustees (Nick Grgas) told him that during the settlement conference back in **November**, the supervisor of the agent in charged of the investigation was behind the agent and shaking his head negatively with eyes looking skyward in an exasperated fashion. Schroeder letter appears to indicate that after the meeting, the supervisor of the agent was approached and asked if he could intervene favorably (**Attach.4**).

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April 7, 2006, I informed the RD by email of the allegation and of course my concern. I requested for Goldberg to be excluded on my Local 12 Funds cases (**Attach-5**).

April 11, 2006, Deputy Director Gaynor became involved in the cases as directed by the RD (**Attach-6**). He requested from me the phone number of trustees' counsel.

April 14, 2006, Deputy Gaynor requested me to make all the records concerning the Schroeder complaint available for his review at COB on Tuesday, April 18, 2006. I complied (**Attach-7**).

After over two weeks, I took back all the records and documents related to the complaint from Deputy Gaynor. I asked him if he reviewed it, His answer to me is "I did not have the time".

\*The documents provided to Deputy Gaynor are the ones listed on page two of this statement (a to f) plus the November 1, 2005 letter from with all the attachments. I did not provide Gaynor the April 3, 2006 faxed letter from .

May 12, 2006, I emailed the RD, CC Gaynor and my real supervisor, Nichelle Langone of my findings concerning the complaint of . The RD responded by email stating "thank you". He CC Goldberg on the Email (**Attch-8**). I was trying to convince them of what I determined to be a serious violation and the amount involved.

\*\*\*\*Gaynor and Goldberg are highly trained and experienced accountants/auditors. I understand Gaynor is a member of the New Jersey Society of Accountants. Goldberg is regularly teaching accounting courses to our agency's investigators that does not have formal accounting/auditing training. **Both of them did not review my accounting evidence. It was on Gaynor's desk for over two weeks.**

May 18, 2006, I requested the RD for a third person to be at the interview of Heinzman. The RD disapproved it (**Attach-9**).

June 14, 2006, Gaynor and the RD basically forced me to arrange an interview of James Heinzman on June 29, 2006 because Goldberg needed to be in Washington DC for a few months detail by June 30, 2006. Initially, I arranged to interview James Heinzman after the June 29, 2006 date (**Attach-10**).

Jonathan Kay and I had an unfriendly discussion at the hallway outside the 12<sup>th</sup> Floor because I strongly disagreed of his intention of changing the interview of Heinzman to any date before June 30, 2006.

June 29, 2006, I and Goldberg interview James Heinzman. Again, no documents were provided to support the trustees' claim on either the VC issues or the new issue that surfaced as stated of the Nov. 1, 2005 letter of . Heinzman and his counsel provided us with verbal presentation.

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Sometimes this summer period Goldberg sat down with Alan Lebowitz and provided him information concerning the complaint of . He was detailed in Mr. Lebowitz office. Mr. Lebowitz is EBSA's Deputy Assistant Secretary of Labor. I really do not know what kind of information he discussed with Mr. Lebowitz since up to this point, he have not seen any audit work papers and other accounting evidence.

This information that Goldberg discussed the issue with Mr. Lebowitz was provided to me by Jonathan Kay. At this time, the complaint of Schroeder has reached the national office and his congressman and senator are in the picture.

September 22, 2006, I told Kay, Gaynor and Goldberg that the agency needs to do a VC letter to address the issue of the non allocation allegation. We have all the documents to prove that no allocation was done (**Attach-11**).

September 29, 2006, letter received from trustees' counsel explaining the status of the investment earnings for 2000. The letter contains **no document to support** the claim. (**Attach-12**). The letter refers some documents as supporting documents; however, these are another undocumented statements.

\*This letter clearly states that the reason the apportioning of the investment earning for 2000 was not done in 2001 is because there was a "short fall". Meaning, the Net Asset available for benefits in 1999 is **less than the total participants account balance**. Also, the letter states that the apportioning of the earning was done in August. 30, 2004. This claim can not be supported by any financial document.

\*I was informed by New York Life 10/31/2006 that the document I requested was sent Federal Express.

On October 31, 2006, I received documents from New York Life concerning the status of the investment earnings of \$374,768 (has increased to \$381,099.30 due to interest). This money is part of the estimated \$2Million investment earning for 2000 that was not allocated to the 500 participants in the 2001. The document shows that this money was used as employer contribution payments instead of being allocated to all participants .Later, after reviewing the document, I expressed my view to Goldberg and Gaynor saying that this is a prohibited transaction. As far as I can remember, they strongly disagreed with my view and stated that maybe the trust/plan document and the collective bargaining agreement allow such transaction. The RD, Gaynor and Goldberg requested copies of the CBA and the plan/trust documents from me.

On November 3, 2006, a letter from James Heinzman to explain the status of the investment earning for 2000 was received. Only partly documented, however, the attached documents show that there is no shortfall as what the September 29, 2006 letter claimed. The attached documents included the audit work papers of Heinzman.

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\*I emailed Jonathan Kay 11/3/2006, 6:27 PM questioning the roles of Gaynor and Goldberg and their reaction to the discovery. I CC'd the national office personnel. By 6:57 PM, Kay responded to me by email stating "Let's talk on Monday (**Attach-13**).

There is no such thing as the plan document or collective bargaining agreement allowing this type of transaction. These three people should know better than that. This type of transaction is illegal under ERISA and also a violation of the 18 U.S.C. Sec. 664.

November 7, 2006, the RD directed me in writing not to contact \_\_\_\_\_, the Local 12 Funds people, James Heinzman or their counsel without approval from either Gaynor or Goldberg (**Attach-14**).

As far as I know, there is no such restriction imposed by Kay to any investigator since I became one in 1999. There is no such restriction imposed on me on my other cases. During this time I am also investigating Local 1175 and Local 427 Funds. The issues on these other local union funds are similar to Local 12 Funds which are undocumented claims by the trustees.

November 8, 2006, Heinzman through his counsel Sara Pikofsky responded to my inquiry 11/6/2006. Ms. Pikofsky email stated that the \$381,099 was allocated on 8/30/2004 which is completely not true.

The criminal statute of the discovery that the \$381,099 was used in violation of ERISA and a possible criminal activity has expired at this point.

January 2007, Nichelle Langone my real supervisor was out for a number of weeks to attend OPM training with Goldberg and to teach at our training site in Boulder, CO. Mike Briglia acted as my supervisor. Sometimes around this month, I showed the Local 12 Annuity Fund issues to Briglia. He is a CPA and a senior investigator with over 30 year experience. He agreed to review it. He stated to me that there are serious violations involved here that could possibly be criminal. He told me he would speak to Nichelle tonight by phone regarding this. The next working day, he categorically stated he will not talk to me anymore about Local 12 Funds. He will only act as my supervisor on rest of my other cases (**Attach-15**).

\*\*\*N. Langone routinely teaches criminal courses at EBSA's training site in Boulder, CO.

March 6, 2007, James Heinzman was interviewed. Again he can not provide documents to support the claim. I told Goldberg after the interview that I need documents not verbal explanation. After the interview, I saw Goldberg and the RD inside the RD's office as I was passing by. I overheard the words spoken and it's about Local 12 Funds and the interview of Heinzman. Although not included or invited, I immediately went inside and participated. Both the RD and Goldberg off course disagreed with my opinion/determination that the \$381,099.30 was used in violation of ERISA. The RD stated to me that as long as the monies is put into the Fund and there is no proof that it

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was diverted somewhere, my case in weak The RD further stated that I have to prove that the monies was used to cover-up for some employer contributions deficiencies.

\*\*After the Heinzman interview, Heinzman's counsel Sara Pikofsky stated to me in the presence of Goldberg that I do not have a case and I should close the investigation and further stated that she used to work or the agency and knows well Alan Lebowitz.

The \$381,099 is part of the year 2000 investment earning of \$1.8 million that was not apportioned. The criminal statue of this finding expired by the time of my discovery.

March 29, 2007, Al Wassell was interviewed. He is the Fund Administrator. During the interview, I again told the trustees' counsels, to show me documented proof to prove the claim. It was in this interview that again, Goldberg openly disagreed with me in front of Al Wassell and counsels regarding the issue of the \$381,099.30 investment earnings.

April 5, 2007 Goldberg called me in to his office. He stated that we will have a conference call with Heinzman and his lawyer. He gave me a printed spreadsheet emailed to him from Heinzman's lawyer. The spreadsheet tried to provide an explanation to what happened to the \$381,099.00 investment earnings and to respond to my requirement that Heinzman provide me with documents to prove that there was a shortfall back in December 31, 2000. **Again, there is no document to prove the validity of this spreadsheet.**

Ms. Sara Pikofsky was on the other phone line representing Heinzman. I did not call for this conference call. After the March 6, 2007 interview of Heinzman, I requested documentation.

May 2, 2007, I questioned both Goldberg and the RD, why the word "create" was changed to locate on my ROI, Part I., issue no. 5, page 10. My draft stated that James Heinzman told investigators he would create the supporting documents on Issue No. 8 on the VC letter. The word "create" was changed by Goldberg to "locate" ( **Attach-16**).

The issue is about the undocumented auditing fees paid by the Fund for the period May 2001. Heinzman was questioned by this investigator why the Funds paid the invoices without the proper supporting documents. On the interview dated 7/19/2004, Heinzman stated that he will "**create**" the supporting documents.

There is a huge difference between **create** and **locate**. Locate means that the supporting documents existed back in May 2001 and just needed to be found. Create in July of 2004 means that payments were made in 2001 without the proper documentation and Heinzman is trying to cover it up by just now creating one. The trustees settled on this issue.

The way I looked at it, Goldberg tried to make this issue weaker by changing the word from create to locate. I do not believe that he can be confused with the two words that

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are completely different in meaning. If I have not caught this, the issue would have been hard to argue for.

May 4, 2007, ROI, Part I was issued. The prohibited transaction of the use of the \$381,099.30 investment earning as an employer contribution payment was **deleted by the RD** according to Goldberg.

The VC letter was issued May 3, 2005. The ROI Part I was finally issued after two years. The RD intentionally delayed me in doing ROI. He wanted me to gather **more evidence** under the "additional supervision" of Goldberg. **No additional evidence was obtained. Trustees' high priced lawyers just simply provided me with verbal statements and documents that do not meet the requirement of proper documentation.**

All the evidence I used to write the VC letter issued on May 2005 was used as evidence for ROI, Part I. At the start of the first settlement meeting Nov. 7, 2005 until the day before I started writing the ROI sometimes in March or April 2007, the trustees counsels was **not able** to provide any document to dispute my findings.

\*\*September 5, 2007, I did a phone interview of participant to find out how he was informed by the trustees of the so called "short fall". I also interviewed participants and concerning this question (**Attach-17**).

Mr. complained to me that how come, Al Wassell, the plan administrator of Local 12 Funds said something to him when he showed up at the office to pick up a vacation check.

According to this is what Wassell said: You and and some of your friends are getting me in trouble by your phone calls to the U.S. Department of Labor. See Report of Interview of

Mr. further said that when he called to complaint it was his understanding that he must be anonymous.

At this point, the trustees and their counsels are aware that only is talking to EBSA. During all the settlement meetings that took place so far, only the name of is mentioned. Starting in 2007, I received a number of calls from other participants; however, they do not reveal their names. Two members agreed to reveal their names; however, wanted to be anonymous at that time. A few weeks before this interview of, I stated to Goldberg and Viet Ly inside Goldberg's office that other participants are now calling and complaining about the allocation issue. I did not name any particular participant except mentioning the name of to Viet Ly who is from the Office of Enforcement at the national office.

My concern is why the plan administrator seems to know that other participants are now calling and why he stated what he stated to

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September 24, 2007 James Heinzman was interview by phone. His lawyer Sara Pikofsky was on another phone line in Washington DC. Goldberg and the **RD** were at this phone interview.

Since 1999, I have not heard or knew of a situation where the RD was present during an interview of the subject suspected of violating ERISA.

\*\*This phone interview was conducted instead of a deposition as suggested by Jeff Monhart. He was with the NYRO as acting Deputy Director. Mr. Monhart is head of Division of Field Operations at the National Office. Initially it was agreed between me, Goldberg and Monhart to subpoena and depose Heinzman. However, a few days later Goldberg informed me that **he** and the **RD** decided not to do the subpoena. Jeff Monhart acknowledged that he was not informed or consulted with the decision of Goldberg and the RD. Goldberg then stated to me that Heinzman agreed to appear voluntarily. Then a few more days later Goldberg informed me that Heinzman would not be available to appear because he is busy doing tax returns.

\*\*Prior to the phone interview, Goldberg asked me to provide him with the list of my proposed questionnaire because Heinzman's lawyer (Sara) is requesting it.

\*\*\*At one point I asked Heinzman a question that was not listed on the proposed questionnaire, Ms. Sara Pikofsky protested and utter or called for Jonathan Kay to say or do something. He did not do anything and I insisted on asking the question to Heinzman.

EBSA does not provide proposed questionnaires to counsels of the subject being investigated. This agency does do this practice. I complied and provided Goldberg my proposed questions.

December 3, 2007, ROI, Part II (non-allocation of the 2000 investment earnings and the prohibited transaction involving the use of the \$381,099 earnings as employer contribution) was issued.

I believe that the issuance of ROI, Part I and later ROI, Part II is highly questionable. I never heard of a Part I and Part II ROI before. This is designed to delay the whole process. I have all the documentary evidence to write an ROI for both Parts I and II back in early 2006.

On this case, before I even started writing the "now so-called Part I" in March or April 2007, Issues No. 1 and 2 of the ROI, Part II were already discovered.

On his memo cover letter dated 12/3/2007 and addressed to Patricia Rodenhausen for my so-called ROI, Part II, Jonathan Kay described the (1) use of the \$381,099 as employer contribution and (2) the non-allocation of the \$1.8 earnings as "**new investigative findings**"(Attach-18).

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January 24, 2008, Investigator Castillo, Goldberg and SOL counsel Weekley meet for the first time to discuss ROI, Part II. On issue no. 2, Goldberg stated a number of times that this issue "does not pass the smell of going to court".

\*\*Ms. Weekley stated the following during the course of the meeting:

" Maybe we should exclude loan receivables as an asset of the plan".

I stated: "If this is considered or adopted solely for the purpose of showing that plan assets as of 12/31/2000 would reflect lower than the participants' total account balance, then this is not in accordance with the generally accepted accounting principles or practice ( GAAP)."

Every time I make a statement to express that this re-allocation and litigation analysis special project of Heinzman is a well-planned creative accounting process to fraudulently not allocate the 2000 investment earnings, I get interrupted by Ms. Weekley or Goldberg.

In one instance, Ms. Weekley stated "ignore the rules" of the plan/trust document when I made a statement saying the "according to the plan/trust document, the earnings must be allocated after the valuation date."

In another instance, Ms. Weekley stated that "I am not a US Attorney "when I stated that the fraud on Issue No. 2 involved the use of "creative accounting."

**(Attach-19) – I expressed my concern about the behavior of Goldberg and Weekley during the Jan. 24, 2008 meeting. (Email dated 1/25/2008).**

On January 31, 2008, counsels for the trustees provided the SOL the proposed settlement offer (**Attach-20**) Pages **10 and 11** of the letter insisted there was supporting documentation back in May 2001. However, the letter states that it can not be located. If my ROI was finalized and the word locate was used, the reader of the counsels' letter would tend to believe that there was in fact supporting document back in May of 2001.

March 2008, Ms. Weekley issued statute of limitation analysis of the issues in ROI, Part II.

My email to dated 3/31/2008 to Ms. Weekley, CC Dennis Kade and Patricia Rodenhause, her immediate bosses shows my **grave concern** the way Ms. Weekley analyzed my documentary evidence of Issue No. 3 of Part II. Her unfounded theory that this is a case of delinquent employer contributions issue is spinning it. My email also reminded Ms. Weekley to review the exhibits that will dispute her theories (**Attach-21**).

My report clearly show the time period reviewed, that employer contribution delinquency is never an issue and that it is clear how plan expenses were paid. Yet, she decided to spin this.

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Pages 7 and 8 of her analysis states:

The ROI states that in March to May 2002, Annuity Plan fiduciaries used Plan assets to augment employer contributions that were allegedly never made. The ROI demonstrates that approximately \$650,000 in Annuity Plan assets were deducted from miscellaneous Plan bank accounts and forwarded with employer contributions to the Plan's main investment account on May 1, 2002, and included in a deposit representing "employer contributions" of \$1,199,828.59. EBSA has reviewed remittance reports and employer contribution amounts transmitted to the Plan's investment account, apparently quarterly, on October 19, 2001, January 28, 2002 and May 5, 2002. That review appears to point up a discrepancy, for the limited period covered, between the amounts reported by certain contributing employers as due to the Plan, and the amount actually deposited on account of those employers. EBSA concludes there is a shortfall (on the basis of the limited evidence of a comparison of total deposits in a certain bank account with the amount of contributions owed as reported by the contributing employers during an apparently corresponding period of time), of some \$421,000 in employer contributions for companies owned or managed by employer trustees of the Annuity Fund.

Drawing a firm conclusion from this evidence is problematic for several reasons. First, it is unclear whether the time periods examined in fact correspond. Second, it is possible that employers were delinquent and subsequently made up those delinquencies. It is not clear from the ROI if the evidence is controlled for this possibility. Third, certain contributions by employers might have been diverted to pay plan expenses. Fourth, unless payroll audit data is reviewed for evidence of employer delinquencies, or eliminated as a source of additional evidence, the evidentiary picture here would appear to be incomplete. The ROI indicates that Schultheis and Panettieri was performing payroll audits for the Annuity Fund during the period in question. This information should be available.

April 3, 2008, tele-conference calls with Ms. Weekley and Dennis Kade of the RSOL and EBSA's RD, Goldberg and Castillo.

During this tele-conference, the RD stated that he will obtain an exemption determination from the Office of Regulation and Interpretation (ORI) on issue no. 3 of the Report. Issue No. 3 is the finding that shows trustees controlled employers only remitted \$585,216 employer contributions to the Fund, but the Fund office transmitted \$1,006,666.00 to the financial custodian on behalf of these trustees controlled employers. Meaning, \$421,449 of the monies transmitted did not come from these employers controlled by the trustees. The RD tried to make this as an exempted transaction. An exempted transaction is a violation according to ERISA, however, if it falls into categories of transactions that EBSA deemed exempted, it's not a violation. **My ROI Part II shows that the \$421,449 monies was taken out of the Fund's asset and used as employer contributions. In other words, this money is part of the investment earning for 2000 that was not allocated.**

During this conference call, Jonathan Kay stated that he will try to obtain some kind of a determination from Jeff Monhart to find out if this issue can be considered an exempted transaction under ERISA. Both Kade and Weekley did not make any comment as far as I can remember on the proposal of Kay.

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I expressed my serious concern about the attempt of the RD to classify the \$421,499 prohibited transaction as an exempted transaction under ERISA. This transaction is also criminal under 18 U.S. C Section 664, however the criminal statute already expired. (Attch-22).

As far as I know, the process of obtaining an exemption of certain transaction that DOL considered prohibited is done by a formal letter request to the Office of Exemption at the national office. The request is done by lawyers of companies, private entities, etc. Also, the formal request is normally done **before** the possible prohibited transaction is actually performed or executed.

Also, as an agency, EBSA does not request exemption on behalf of private companies and entities nevertheless asking for exemption when the prohibited transaction had already occurred and discovered as the result of its investigation.

During this tele- conference call, Ms. Weekley stated that maybe the \$421,449 was just deposited into another bank account. It appears to me that she is trying to downplay this issue by having this theory that somehow the money was deposited into another bank account with the intention that at the end, this money will ultimately belong to the Annuity Fund.

Also, she further stated that based on her experience litigating union sponsored funds, there is nothing wrong or illegal to have what she called "slush fund".

I countered that the "slush fund is about a \$2 million issue.

I stated that imaginary bank account does not count and added that my audit shows that there is no other bank account except the bank accounts reflected on the financial statements.

I also stated that if this money, if deposited into a bank account not owned by the Fund, then it is money laundering.

April 17, 2008, trustees of Local 12 Funds offered the settlement data to settle issues on ROI, Part I.

May 12, 2008, inquired why I am being excluded from the proposed settlement meeting on May 28, 2008 with counsels of Local 12 Funds Trustees. Also, I inquired about the letter sent to counsels of trustees.

May 15, 2008, RD informed me that I am being **excluded** from the meeting on May 28, 2008. According the RD RSOL lost confidence on me, I have a one-sided view of the issues on ROI, Part II. And I disrespected the RSOL.

During the meeting, Goldberg pointed out something on my ROI that according to him is contradictory. I completely disagreed and I asked him why during the January 24, 2008 meeting with Ms. Weekley he stated three or four times that Issue no. 2 "does not pass the smell of going to court." He denied saying this phrase. I told him he is lying. For this reason, Kay gave me snort of a letter of counseling for being disrespectful to Goldberg (Attch-23).

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**\*\*\*July 16, 2008, Field office training at 290 Broadway federal building conducted by OE.**  
I spoke to Jeff Monhart about this training. He told me, he personally designed this training for New York since we are dealing here with a lot of Union Funds.

**I fielded a question to David Lurie, ORI, if Loan Receivables is considered plan asset. His answer is YES. Present on the training are Kay, Goldberg, Weekley and Dennis Kade. Later Carmela Pagano, CPA and Senior Investigator commented that I brought up a good question.**

July 31, 2008, meeting was held between the SOL lawyers with counsels of the Trustees. **Only Goldberg** attended the meeting.

This so called "discussion" was staged to provide Heinzman with what I consider self-serving (to Heinzman) questions so he can give responses that are also self-serving. (See memo dated July 31, 2008, August 7-8, 2008 from Goldberg and Weekley) (**Attach-24** ).

As I stated earlier, I was excluded because according to Jonathan Kay, I disrespected RSOL, the RSOL lost confidence on me and I have a one-sided view of the issues on ROI, Part II.

This "discussion" was staged to permit James Heinzman to provide untrue and misleading responses to the questions without the danger of lying to federal investigators. That's why Goldberg and Weekley called it discussion and that's why **I, the investigator** of this case was **excluded**. **Also**, it permitted Heinzman's misleading and untrue responses to heard by Weekley and not confronted by this investigator for the truthfulness of his responses. This investigator would have challenged Heinzman to demonstrate the truthfulness of his responses by asking him what data in the financial statements will show that and where. This investigator would have all the financial records filed on the table ready for Heinzman to show where, what, when and why.

Neither Goldberg nor Weekley, as the memo shows, tried to obtain clarification from Heinzman what exactly he meant. And finally, my ROI, Part I, page 8 clearly shows that on January 19, 2006 he told investigators that S & P created the Local 12 Benefit Fund investment tracking system. He presented the investigators with what he claimed were investment analysis documents generated by this system. Review of the documents clearly shows that it was created by the Bank of New York. Despite having the knowledge that Heinzman does not hesitate to make false statements, Goldberg and Ms. Weekley arranged this "discussion" to listen to his misleading statements.

September 9, 2008, Jonathan Kay provided me with the Summary of the 7/31/2008 meeting and another letter (proposed) from SOL requesting trustees counsels further clarifying explanations and documentation of the explanation and evidence provided at the July 31, 2008 meeting.

November 10, 2008, trustees counsel provided what are supposed to be documents that will address issue no. 3.

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November 14, 2008, I completed the review of these documents and it was a waste of my time. I already received the same documents two years earlier. Three stacks and about a foot high for each stack,

November 19, 2008, I again discussed the issues with Goldberg. Again, he completely disagreed with my findings concerning issues 1 and 2(**Attach-25**).

### **Statements provided March 12, 2009**

November 20, 2008, Kay wanted me to again review these documents that I reviewed 11/14/200. The result is of course the same.

See emails to disclose result of my review of these three stacks again.

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December 2, 2008, Goldberg requested more info.

December 3, 2008, phone interviews were conducted on \_\_\_\_\_ and \_\_\_\_\_ (**Attach-26**).

Both Schroeder and Lannigan pointed out to me that the data used by Heinzman in doing the Annuity Fund Interest Allocation Analysis dated Sept. 28, 2001 does not agree with the data reflected on the financial statements. See interviews of \_\_\_\_\_ and \_\_\_\_\_.

December 4, 2008, Kay, Goldberg and I meet to again review the three stacks of documents submitted that are suppose to address issues no. 3.

On this meeting Kay insisted that the three stacks are proper documentation to address Issue no. 3. He became enraged and pointed his finger on me when I stated that he sounds like a defense counsel. Later we discussed if loan receivable is considered a plan asset (**Attach-27**).

December 15, 2008 a meeting with Scott Albert from OCA took place. See memos dated 12/8/2008 and 12/15/2008 for more detail (**Attach-28**).

December 30, 2008, Kay communicated with Ms. Corpus, Legal Assistant of New York Life without my participation (**Attach-29**).

The main purpose of this meeting was for Scott Albert to make a determination if Loan Receivables is considered plan asset. At the start of the meeting Mr. Albert immediately stated that Loan Receivable is always a plan asset. As it turned out, the meeting's discussion centered mainly on the correctness of the total participant account balance of \$46,686,166.17 as of 12/31/2000.

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The audit work papers of James Heinzman, the documents New York Life received from the Fund and the New York Life statement dated June 19, 2001 clearly show that the total participant account balance as of 12/31/2000 is **\$46,686,166.17**

The same New York Life statement also showed that by June 20, 2001 the total participant account balance changed from \$46,686,166.17 to **\$46,607,942.91**. The amount actually decreased by \$78,223.26. The statement clearly shows the amount as follows:

|                              |                        |
|------------------------------|------------------------|
| <b>Current PARTS Balance</b> | <b>\$46,607,942.91</b> |
|------------------------------|------------------------|

This same statement was actually used by James Heinzman as part of his audit work papers to reconcile total participant account balance with the Fund's total trust assets. During the reconciliation no discrepancy was found (Attached executed audit plan dated.

Mr. Albert's involvement was originally for the purpose of determining whether loan receivable is considered plan asset. For some reason, he is in the process of making a determination whether the total participant account balance of \$46,686,166 as of 12/31/2000 cited of my report is correct or not.

My investigation of Local 12 Funds was hindered and undermined by Regional Director Jonathan Kay for the purpose of justifying his reason of not selecting me for promotion to grade 13. When I made an additional discovery in November 2005 that the Annuity Fund investment earning of \$1.8 million for the year 2000 was not apportioned as required by the ERISA law and the possible occurrence of a criminal financial fraud I was completely ignored by the "special supervisor". He assigned Robert Goldberg as my "special supervisor" to do the job and to make it appear that I did not performed my investigation according to the agency's standard. Goldberg only acted as my supervisor on my Local 12 Funds cases. My real supervisor was not involved as per instruction from Jonathan Kay.

I also believe that his effort of making sure that I did not get promoted is part of his mind set of not promoting deserving minorities to grade 13. Since he became Acting Director and ultimately Director, there are two other minority investigators in our agency that have accomplished **a lot** to deserved promotion to grade 13. A Hispanic female and a black female have been with this agency since 1999. Both of them completed significant civil and criminal cases and are well experienced investigators. However, a white male investigator who started with this agency June 2005 is now a grade 13. I do not believe he has completed any criminal cases nor completed any significant civil case yet. At the present there is no grade 13 minority investigator in this agency.

Jonathan Kay's actions, unfortunately, escalated into the cover-up of a multi-million financial fraud committed by the trustees against the benefits of over 500 participants who are mostly lowly educated and not in best of health and the possible criminal violation under U.S.C intentionally ignored.

As chronologically explained above, Goldberg immediately discredited the validity of the accounting/auditing fee issues stated on VC letter issued May 3, 2005. He became my acting supervisor only in October 2005. He has not reviewed the fully documented evidence to support

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the VC letter and with almost no experience as a supervisor. In contrast, my former supervisor Jonathan Brown who verified and approved the VC letter had many, many years experience as a supervisor. As I stated above, during the November 2005 first settlement meeting with the trustees and their counsels, I saw him making highly questionable gestures as I was making rebuttal statements against counsels' undocumented contentions/claims. After the meeting, he spoke to the lead counsel without my present. These two incidents are collaborated by the letter of participant [redacted] faxed to me dated April 3, 2006.

He completely ignored the possible criminal nature of my discovery November 2005 that the apportioning of the investment earning for 2000 totaling \$1.8 million of the Annuity Fund was not done as required by ERISA 404 (D) and by the Fund's plan document.

Goldberg's statements\* (**Attach-30**) to the EEO investigator claiming that my investigation of the Funds has not been up to EBSA standards and that I have not obtained sufficient facts and documentation to properly support the issues are completely false. As proof of that, the trustees' counsels agreed to a settlement April 2008 on the accounting/auditing issues because they are unable to provide any document to contradict my fully documented evidence as stated on the VC letter dated May 3, 2005.

\* Note: His statements shows that he is denying receiving the November 1 2005 letter from Mr. [redacted] and giving it to me later. As a standard office procedure, all mailed correspondence is received by the RD's secretary. The secretary then turns it over to the RD. The RD then distributes it to the supervisors and they distribute it to the corresponding investigators.

Jonathan Kay also involved the former Deputy Jeff Gaynor to engage in unnecessary and harassing interference on my investigation for the purpose of delaying the process. I provided Deputy Gaynor all the accounting records for his review on the allegation of participant [redacted]. Instead, he did not review it and was mainly interested in reviewing the undocumented statements of the trustees' counsel

I was not allowed to directly communicate with all the parties concern. Both Goldberg and Gaynor communicated with the trustees' counsels without my participation. I was prevented to depose James Heinzman; the accountant who I believe did all the "creative accounting" to facilitate the fraud. This restriction solely applied to me and also only on my Local 12 Funds cases.

I was excluded from any proposed settlement meeting with counsels of the trustees because according to him I disrespected the Solicitor of Labor, that they lost confidence on me and that I am a one sided view on the non- allocation issue.

In an appalling effort\* to make the non-allocation of the investment earning becomes a non-issue, he tried to obtain a determination from the Office of the Chief Accountant to classify Loan Receivables (Loan Fund) as not a plan asset of the Fund. Generally Accepted Accounting Principles or Practices (GAAP) in the United States and around the world always classifies any kind of receivables as asset of an entity. Here, Jonathan Kay, in the most callous manner, tried to not include the Loan Fund amount as part of the Fund's total asset. If this is done, it will show

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that the Fund's asset maybe less than the total participant account balance and the trustees' alibi look credible.

\* Bob Goldberg who regularly teaches accounting courses to the agency's new investigators that do not have an accounting background just simply agreed with it. He knows well that receivables are always an asset.

And in another effort to make the non-allocation of the earning go away, he communicated with New York Life without my participation and asked Ms. Corpus, a legal assistant, to respond if the \$46,686,166 total participant account balance and the "Loan Fund" (loan receivables) are two separate items. Ms. Corpus responded by telling him the Loan Fund is a separate item.

Jonathan Kay is trying to demonstrate that that total participant account balance as of 12/31/2000 is \$46,686,166 plus the loan fund of \$2, 756,494 for a total of **\$49,442,660**. If this figure is use as the basis the investment earning is allocated to, then the alibi of the trustees appears to be credible.

However, as the June 19, 2001 statement from New York Life shows, the investment earning for June 20, 2001 was allocated to the total participant account balance of **\$46,607,942.91. and not the \$49,442,660.** The difference between the \$46,607,942.91 and the total trust balance of \$47, 931,470 which is \$1,323,527 was allocated to the 500 or so participants on this date. The loan fund balance of \$2,756,494 as of 12/31/2000 has no role on this process and is completely not a factor.

And, finally in another effort to make the non-allocation of the earning go away, he requested the OCA to review and analyze the annual reports and related materials (attached). The wordings in the cover letter clearly show this report is designed to "spin" and provide Jonathan Kay and his surrogates, including the Solicitor of Labor who is his wife, reasons to make a determination that the non-allocation of the investment earning is a non-issue thereby covering up the fraud against the powerless participants.

The report plus the attachment is huge, however, there is not single documentary evidence presented to support the short fall alibi or to contradict my documented findings. In other words, this so called "Practical Inquiry" of Scott Albert is only a theory and is completely undocumented. The huge attached documents are used solely for theoretical purpose.

The violation is clear and simply. The trustees failed to follow the plan document as required by ERISA Section 404(a) (1) (D) and their claim that there was short fall of plan asset as of December 31, 2000 is absolutely undocumented.

I requested supporting documentation on March 20, 2006 to properly document the misallocation stated on the Annuity Fund Interest Allocation Analysis dated September 28, 2001 (Attach-31). Up to this day, I have not received one.

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The claimed shortfall of \$1.9 M occurred before 2000 and it was purportedly discovered September 2001. \$1.9 million is a huge amount of money. There is no way this short fall could not have been discovered during the financial audit completed a month before.

The accounting cycle of the Fund's financial process is the same as any business entity. What ever is the bottom line amount at the end of each year is carried forward for use as the beginning amount for the following year. The losses that occurred from 1993 to 1999 were always factored into and reflected on the bottom line amount of each following year whether they were discovered or not.

When the \$49,497,522 net asset available for benefit was arrived at 12/31/2000, the \$1.9 million shortfall is already factored into this amount. In other words, if there were no \$1.9 million losses, this amount could have been potentially \$1.9M more.

The trustees hired Schultheis and Panetteiri to perform "creative accounting" or "accounting gimmick" to show that there was a shortfall of \$1.9 million and it was eliminated by the non-allocation of the \$1.9 million 2000 Plan-year earnings.

In other words, what they claimed was done to fix the shortfall was to use the \$1.9 million earning to make up for the losses. In the process of doing this, they claimed, the Fund had enough assets to go "live" or self-directed. The Scott Albert review, the way it was written, mirrors the September 29, 2006 trustees' letter provided to EBSA. **Also, both are undocumented.**

This Scott Albert Review is solely designed to nullify my documented findings and justify the behavior of Jonathan Kay who intentionally ignored the criminal nature of this financial fraud that possible involving millions.

Jonathan Kay's alibi that he and his surrogates are not fully convinced of the allegation as presented on my ROI, Part II and they just wanted an opinion from others is simply inexcusable and outrageous. The bottom line, he wants me to recognize and accept the unsubstantiated verbal and written statements from the trustees' counsels as acceptable evidence.

The three people that are mainly complaining, \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ are lowly educated blue collar workers. Just like me, an immigrant from a third world country, they are not well-connected. During this Bernie Madoff era, these three participants and another one that died in Las Vegas due to asbestos related illness are helpless against financial fraud and the relentless effort of the Regional Director and his surrogates to make their cause go away.

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Statement of JOSE B. CASTILLO Date: 4/9/09

4/9/09

1 of 26 with 31 ATTACHMENTS

I have read this statement consisting of \_\_\_ pages. I have been given an opportunity to make corrections. Pursuant to 28 USC 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on this 9th day of APRIL, 2009

[Signature]  
Deponent's Signature

Subscribed and sworn before:

[Signature]  
Special Agent

4/9/09  
Date

Witnessed by: [Signature] Case Number: 14-2601-0008 IA

Title: ATG

OIG 118C (OLRFI 9/05)

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**2-1**

U.S. Department of Labor

Employee Benefits Security Administration  
33 Whitehall Street, Suite 1200  
New York, NY 10004  
Phone: (212) 607-8600  
Telefax: (212) 607-8681



FILE

MAY 04 2005

May 3, 2005

**SENT CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Boards of Trustees  
Local 12 Asbestos Workers Employee Benefit Funds  
25-19 43rd Avenue,  
Long Island City, NY 11101-4208

Re: Local 12 Asbestos Workers Annuity Fund Case No. 30-099939 (48)  
Local 12 Asbestos Workers Welfare Fund Case No. 30-099940 (48)  
Local 12 Asbestos Workers Pension Fund Case No. 30-100130 (48)  
Local 12 Asbestos Workers Vacation Fund Case No. 30-100460 (48)  
Local 12 Asbestos Workers Education Fund Case No. 30-100551 (48)

Dear Boards of Trustees:

The Department of Labor ("Department") has primary responsibility for the administration and enforcement of Title I of the Employee Retirement Income Security Act of 1974 ("ERISA"). Title I establishes standards governing the operation of employee benefit plans such as the Local 12 Asbestos Workers Annuity Fund ("Annuity Fund"), the Local 12 Welfare Fund ("Welfare Fund"), the Local 12 Pension Fund ("Pension Fund"), the Local 12 Vacation Fund ("Vacation Fund"), and the Local 12 Educational Fund ("Educational Fund").

This office has concluded its investigation of the Annuity, Welfare, Pension, Vacation and Educational Funds ("Funds") and of your activities as Trustees. Based on the facts gathered during this investigation, and subject to the possibility that additional information may lead us to revise our views, it appears that, as Trustees, you have breached your fiduciary obligations to the Funds, and have violated several provisions of ERISA. The purpose of this letter is to advise you of our findings and to give you an opportunity to comment before the Department determines what, if any, action to take.

As we understand the facts, many of which you provided to this office during the course of our investigation, the Annuity, Welfare, Pension, Vacation and Educational Funds are multi-employer employee benefit plans that provide pension, health and other benefits to eligible participants. The Funds were established pursuant to collective bargaining agreements between the Local 12 Asbestos Workers Union and various employers. A joint Board of Trustees consisting of both employer and union trustees administers each of the Funds. The same individuals sit on the Board of Trustees for each of the five Funds. As Trustees, each of you have been fiduciaries to each of the Funds as defined in ERISA Section 3(21) as well as parties in interest to each of the Funds as defined in ERISA Section 3(14).

(1)



**1. Improper Payment to the Union for Collection Services of the Business Manager**

Our investigation revealed that each of the Funds reimbursed the Local 12 Asbestos Workers (the "Union") for the collection services allegedly performed by the Union's Business Manager. From February 1996 until April 2002, the Union's Business Manager, who is also a Trustee for each Fund, maintains that he devoted one day per week to make phone calls to employers who reportedly were behind in transmitting contributions to the Funds. The investigation disclosed that the Business Manager did not maintain any records or logs of the phone calls made. Further, during a September 16, 2003 interview, the Plan Administrator stated to this office's Investigator that he was unaware the any records documenting the Business Managers' purported calls. Moreover, in our view, it is highly unlikely that an individual could spend an entire day of each and every week contacting the relatively small number of contributing employers to the Funds regarding delinquent contributions. Consequently, it is our belief that, at a minimum, the Funds over compensated the Union for any collection services that the Business Manager may have performed on behalf of the Funds.

Below is a summary of the Funds' payments to the Union for the Business Manager's alleged collection services:

|              |                     |
|--------------|---------------------|
| 1996         | \$ 12,505.44        |
| 1997         | 20,543.39           |
| 1998         | 13,610.45           |
| 1999         | 17,027.52           |
| 2000         | 21,169.32           |
| 2001         | 26,506.24           |
| 2002         | 8,785.26            |
| <b>Total</b> | <b>\$120,147.62</b> |

It is our view that the above transactions violate ERISA Sections 404(a)(1)(A) (ii), (B) and (D); and 406(a)(1)(D) and 406 (b) (1) and (2) which provide, in pertinent part:

**Act Section 404(a)(1)** . . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and-

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or Title IV.

**Act Section 406(a)**, [e]xcept as provided in Section 408:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect- . . .

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan;

Act Section 406 (b) ... a fiduciary with respect to a plan will not –

- (1) deal with the assets of the plan in his own interest or for his own account;
- (2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interest are adverse to the interest of the plan or the interest of its participants or beneficiaries.

**2. Improper Allocation of Payroll Audit Fees**

Our investigation revealed that the accounting firm of Schultheis & Panettieri, LLP (“S & P”) was hired to provide payroll audit services to the Funds in 1998 with fees paid on an hourly rate. Payment of the payroll audit fees was allocated among the five (5) Funds. However, in the course of our investigation it was discovered that the payroll audits also benefited the Local 12 Asbestos Workers General Fund and the Insulation Industry Promotional Fund (IIPF) to which the contributing employers are required to make contributions pursuant to their CBA with the Benefit Funds. Audit procedures undertaken by the payroll auditors generate schedules that divide the total amount due for the period to each of the seven entities when there is a deficiency.

Although seven entities benefited from the payroll audits, only the five Funds shared in the payment for these services. The table below shows the amounts by which the Funds overpaid because the audit fees were not shared by all seven entities.

|                                                             |    |                  |
|-------------------------------------------------------------|----|------------------|
| Payroll Audit Fees Paid by the Five Funds, 1998 to 2004     | \$ | 349,674.00       |
| Allocation to 5 Entities                                    |    | 5                |
|                                                             | \$ | 69,934.80        |
| <br>Payroll Audit Fees Paid by the Five Funds, 1998 to 2004 | \$ | 349,674.00       |
| Allocation to 7 Entities                                    |    | 7                |
|                                                             | \$ | 49,953.43        |
| <br>Overpayment by the Funds                                | \$ | <u>19,981.37</u> |

By permitting the Funds to pay for audit fees properly payable by the Local 12 Asbestos Workers General Fund and the IIPF, the Trustees violated ERISA Sections 404(a)(1)(A), (B), 406(a)(1)(D) and 406(b)(1) and (2), cited above.

### 3. Improper Allocation of Legal Fees

Our investigation revealed that the Funds retained the law firm of Colleran, O'Hara & Mills ("COM") which received a monthly retainer for general legal services additional fees for collection and other legal services. During 2000 to 2003 collection-related legal fees were allocated among the five (5) Funds. Yet, the investigation disclosed that the collection services provided by COM benefit resulted in recoupment of contributions payable to the Local 12 Asbestos Workers General Fund and the IIPF as well as the five Funds.

Thus, as with the payroll audit fees the Funds overpaid the following amounts because the legal fees were not shared by the seven entities that benefited from the legal services:

|                                                            |           |                  |
|------------------------------------------------------------|-----------|------------------|
| Legal Collection Fees Paid by the Five Funds, 2000 to 2003 | \$        | 308,048.66       |
| Allocation to 5 Entities                                   |           | 5                |
|                                                            | \$        | 61,609.32        |
| Legal Collection Fees Paid by the Five Funds, 2000 to 2003 | \$        | 308,048.66       |
| Allocation to 7 Entities                                   |           | 7                |
|                                                            | \$        | 44,006.95        |
| <b>Overpayment by the Funds</b>                            | <b>\$</b> | <b>17,602.37</b> |

In our view, by permitting the Funds to pay legal fees properly payable by the Local 12 Asbestos Workers General Fund and the IIPF, the Trustees violated ERISA Sections 404(a)(1)(A), (B), 406(a)(1)(D) and 406(b)(1) and (2), cited above.

### 4. S & P Billing for Preparation of Tax Forms

Schultheis & Panettieri, LLP was hired by the Trustees to perform year-end financial audits of the five benefit Funds starting in May 2001. Among the services S & P provided were preparation of Forms 941 and, W-2s and W-3s for employees of the Welfare and Educational Funds only. These two funds are required to file the Employer's Quarterly Federal Tax Returns (Form 941) and annual the Wage and Tax Statements (W2/W3) for its salaried employees. Throughout the period at issue, the Welfare Fund has had three employees, including the Plan Administrator. The Educational Fund has had five paid instructors.

Trustee Dennis Ippolito stated to this office's investigators that S & P had promised to use staff auditors instead of management employees to keep the costs down. However, the investigation revealed that on various occasions, S & P used a partner, a manager and two senior auditors to prepare the Form 941s and W-2s.

Additionally, in the course of our investigation we discovered that Ms. Veronica Saunders started working for the Funds in August 2001 as the bookkeeper. Prior to her employment with the Funds, Ms. Saunders had many years of experience as a bookkeeper using computerized bookkeeping software. Although S & P trained Ms. Saunders on all the accounting functions for the Funds, she was never trained on the preparation of the Form 941s and the W-2s or W-3s.

In our view, preparation of the Forms 941 and W-2 and W-3s was a relatively uncomplicated process that could have been performed by Ms. Saunders without additional cost to the Funds. Yet, the Trustees permitted the Funds to compensate S & P the following escalating amount of fees for preparation of the form 941s and W-2s and W-3s after Ms. Saunder's hiring.

| Year          | Education Fund    | Hours        | Welfare Fund      | Hours        | Totals             |
|---------------|-------------------|--------------|-------------------|--------------|--------------------|
| 2001          | 360.00            | 4            | 705.00            | 9            | 1065.              |
| 2002          | 660.00            | 8            | 2,493.75          | 28.75        | 3,153.75           |
| 2003          | 3,088.75          | 23.75        | 2,932.50          | 29.5         | 6,021.25           |
| 2004          | 2,812.50          | 35.5         | 902.50            | 13.5         | 3,715.00           |
| <b>Totals</b> | <b>\$6,921.25</b> | <b>71.25</b> | <b>\$7,033.75</b> | <b>79.75</b> | <b>\$13,955.00</b> |

#### 5. S & P Excessive Billing for Bookkeeper Interview

As noted above, Ms. Saunders was hired as the Funds' bookkeeper in August 2001. An auditor from S & P attended Ms. Saunders' interview that lasted 30 minutes. Yet, the the Annuity, Pension and Welfare Funds were each billed two hours for these services which the Trustees permitted the Funds to pay. Thus, the funds overpaid S & P \$825.00 for attending the interview Which was calculated as follows:

|                       | Annuity | Pension | Welfare | Total | Rate     | Amount Billed   |
|-----------------------|---------|---------|---------|-------|----------|-----------------|
| Hours Billed          | 2       | 2       | 2       | 6     | \$150.00 | \$900.00        |
| Duration of Interview |         |         |         | .5    | \$150.00 | (\$75.00)       |
| <b>Overcharged</b>    |         |         |         |       |          | <b>\$825.00</b> |

#### 6. S & P Billing for "Accounting Assistance"

Our investigation disclosed that seven S & P auditors, other than James Heinzman, billed the Funds for accounting assistance charges. Heinzman stated that he was the only one that actually provided accounting assistance to the bookkeeper and that the other auditors provided investment analysis to the Funds and billed it as accounting assistance. Yet, review of the Funds' records revealed there is no documentation to establish that investment analysis was provided. Below is the summary of accounting assistance charges that purportedly were for investment analysis:

| Period       | Number of Hours | Amount Billed      |
|--------------|-----------------|--------------------|
| 2001/2002    | 72.75           | \$15,167.50        |
| 2003         | 167.75          | \$12,581.25        |
| 2004         | 149.75          | \$11,431.25        |
| <b>Total</b> | <b>390.25</b>   | <b>\$39,180.00</b> |

### 7. S & P Billing for Special Projects

Our investigation also disclosed that the S & P billed the Funds for a number of special projects. However, our investigation did not yield any documents or work product generated by several of such special projects, thereby casting doubt on whether the Funds' payments for such projects were proper. Also, invoices show additional billings for certain projects that were already completed. Below is a summary of the billing for special projects that are questioned by the Department:

| Year | Fund     | Billed              |
|------|----------|---------------------|
| 2001 | Annuity  | \$ 2,645.00         |
|      | Welfare  | \$ 750.00           |
|      | Pension  | \$ 750.00           |
|      | Training | \$ 487.50           |
| 2002 | Annuity  | \$ 9,622.50         |
|      | Welfare  | \$ 5,080.00         |
| 2003 | Welfare  | \$ 4,811.25         |
|      |          | <b>\$ 24,146.25</b> |

### 8. S & P Billing for Financial Audit and Secretarial Services

In June 2001 the Funds paid S & P \$36,900 for financial audit and secretarial services purportedly performed in May 2001 by several auditors, including the Manager James Heinzman, and secretarial staff. However, these payments were made without any supporting documents as the S & P's invoices only showed the dates and the amounts billed. When Heinzman became aware of the lack of supporting documentation, he retroactively formulated and submitted such documentation in July 2004. Yet, this after-the-fact documentation was limited to the date services were performed and by whom.

However, the contemporaneous work papers for the financial audits revealed that during the month of May 2001 Sharon Haddad was the only auditor that performed audit work. More specifically, the work papers show that she completed the initial audit work by 5/12/2001 and billed the Funds for 14.5 hours. The bulk of the audit work was performed in the month of June 2001 which was billed separately. Given the absence of any contemporaneous work papers or other documentation verifying that audit work, other than Ms. Haddad's was performed in May 2001, the following billings for May 2001 are unsubstantiated:

| Auditor      | Work Performed | Rate      | Hours Billed | Amount              |
|--------------|----------------|-----------|--------------|---------------------|
| Haddad       | Audits         | \$ 90.00  | 55.50        | \$ 4,995.00         |
| Heinzman     | Audits         | \$ 110.00 | 67.00        | \$ 7,370.00         |
| Abbatiello   | Audits         | \$ 75.00  | 79.00        | \$ 5,925.00         |
| Murray       | Audits         | \$ 90.00  | 57.50        | \$ 5,175.00         |
| Gross        | Audits         | \$ 90.00  | 80.75        | \$ 7,267.50         |
| Matthews     | Secretarial    | \$ 35.00  | 16.50        | \$ 577.50           |
| <b>Total</b> |                |           |              | <b>\$ 31,310.00</b> |

**9. S & P Billing for Attendance at Trustee Meetings**

S & P charged the Funds hourly consulting fees for the attendance of two auditors at the Trustees' meetings. In conjunction with the auditors' attendance at the meetings, the Funds are billed for secretarial services. It is the Department's view that the attendance of only one auditor was required at the meetings. Moreover, it appears that S & P billed the Funds for Trustee meetings that were never held. Finally, the investigation revealed that on numerous occasions, the total hours billed to all the Funds exceeded the duration of the meetings. Below is the summary:

| Heinzman                          | Panettieri | Total Hrs. Billed | Total Duration of Meetings | Difference        |
|-----------------------------------|------------|-------------------|----------------------------|-------------------|
| 87 hours                          | 56.5 hours | 143.5             | 97.95 hours                | 45.55 hours       |
| Hourly rate charged               |            |                   |                            | \$175.00          |
| <b>Total amount of overcharge</b> |            |                   |                            | <b>\$7,971.25</b> |

**10. S & P Billing for Post-Audit Services**

After the issuance of the audit reports, S & P continued billing the Funds for financial audit and secretarial services, although there is no documentation establishing that any additional audit or secretarial work was performed. There were no changes or modifications to the audit reports and/or financial statements to justify the additional billings. In many instances the staff auditor, with primary responsibility for conducting the audit of a specific Fund, billed for more hours after the issuance of the audit report than were billed from the start to completion of the audit. In other situations, certain auditors were billing the Funds for a large number of hours, but the audit work papers and the audit plan did not show proof that these auditors were actually involved in the audit work.

Our investigation also disclosed that in a number of situations, S & P continued billing the Funds for financial audit and secretarial services after the release dates of the reports. The release date of an audit report comes after the issue date. Based on S & P procedures, the lag time between the issue date and the release date are between two to five months.

**11. Payment of Additional Legal Fees for Services that were Covered by the Retainer Agreement**

As noted above, the law firm of Colleran, O'Hara & Mills was retained by the Funds and was paid a monthly retainer for general legal services, and an additional separate hourly rate for contribution collection and other legal services. Yet, the Funds' records show that the Funds were billed and paid for numerous other legal services that were already covered under the retainer agreement or for services that were unnecessary or unexplained. Other billings are duplications. Below is a summary of these billings:

|                                                                                   |            |
|-----------------------------------------------------------------------------------|------------|
| Billings for attendance and functions related to subcommittee covered by retainer | \$ 4062.64 |
|-----------------------------------------------------------------------------------|------------|

|                                               |                    |
|-----------------------------------------------|--------------------|
| Review of audit reports that have no findings | 8,292.48           |
| Unsubstantiated and Unexplained Billings      | 1,119.29           |
| Duplications                                  | 598.75             |
| <b>Total</b>                                  | <b>\$14,073.16</b> |

In our view, by causing or permitting the Funds to pay S & P and COM for 1) unnecessary services and/or services that apparently were not provided and 2) in excess of the value of the services provided, as referred to in items 4-11, above, the Trustees violated ERISA Sections 404(a)(1)(A) and (B), 406(a)(1)(D) and 406(b)(1) and (2), cited above.

In our view, you are in violation of ERISA for the reasons stated above. The violations will continue until you correct them. Therefore, we invite you to discuss with us immediately how you will correct these violations and restore the losses to the Funds. We note that some of the practices noted above may have continued in 2004 and 2005.

We have provided the foregoing statement of our views to help you evaluate your obligations as fiduciaries within the meaning of ERISA. Your failure to correct the violations and restore losses may result in the referral of this matter to the Office of the Solicitor of Labor for possible legal action. In addition to any possible legal action by the Department, you should also be aware that the Secretary, pursuant to section 504(a) of ERISA, is authorized to furnish information to "any person actually affected by any matter which is the subject" of an ERISA investigation. Further, even if the Secretary decided not to take any legal action in this matter, you would nonetheless remain subject to suit by other parties including plan fiduciaries and plan participants or their beneficiaries.

If you take proper corrective action the Department will not bring a lawsuit with regard to these issues. However, ERISA section 502(l) requires the Secretary of Labor to assess a civil penalty against a fiduciary who breaches a fiduciary responsibility under, or commits any other violation of, Part 4 of Title I of ERISA or any other person who knowingly participates in such breach or violation. The penalty under section 502(l) is equal to 20 percent of the "applicable recovery amount", a term which means any amount recovered from a fiduciary or other person with respect to a breach or violation either pursuant to a settlement agreement with the Secretary or ordered by a court to be paid in a judicial proceeding instituted by the Secretary.<sup>1/</sup>

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<sup>1/</sup> The Department may, in its sole discretion, waive or reduce the penalty if it determines in writing that the fiduciary or knowing participant in the breach acted reasonably and in good faith, or it is reasonable to expect that the fiduciary or knowing participant will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted. The Department may, in its sole discretion, agree to such a waiver or reduction in conjunction with entering into a settlement agreement. The procedure for applying for a waiver or reduction of the civil penalty is set forth in an interim regulation promulgated by the Department at 29 C.F.R. 2570.80 to 2570.88. A petition for a waiver or reduction of the civil penalty should be directed to Jonathan Kay, Acting Regional Director, U.S. Department of Labor, Employee Benefits Security Administration, 33 Whitehall Street, Suite 1200, New York, NY 10004. The Department has also issued a proposed regulation regarding implementation of the civil penalty at 29 C.F.R. 2560.502l-1.

Further, you should understand that the Department is speaking only for itself and only with regard to the issues discussed above. The Department has no authority to restrain any third party or any other governmental agency from taking any action it may deem appropriate.

We hope this letter will be helpful to you in the execution of your fiduciary duties, and that, with respect to the specific matters discussed, you will promptly discuss with us how this violation may be corrected and the losses restored to the Plan. Please advise me, in writing, within 10 days of your receipt of this letter what action you propose to take to correct the violations described above.

Sincerely,

A handwritten signature in black ink, appearing to read "Jonathan Kay". The signature is written in a cursive style with a long horizontal stroke at the end.

Jonathan Kay  
Acting Regional Director