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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
Payroll Audit Fees Paid by the Five Funds, 1998 to 2004	\$	349,674.00
Allocation to 7 Entities		7
	\$	49,953.43
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
Total amount of overcharge				\$7,971.25

**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
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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(1) 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(1) 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. 2560.5021-1.

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", written over a printed name.

Jonathan Kay  
Acting Regional Director

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November 1, 2005

United States Dept. of Labor/EBSA  
33 Whitehall Street  
Suite 1200  
New York, NY 10004

Attn: Jose Castillo

SUBJECT: Asbestos Workers Local 12 Benefit Funds  
Litigation and Re-Allocation Analysis

Dear Mr. Castillo:

Reference the above subject document, copy of which is enclosed, I seek the assistance of your department to ascertain the provisions, remedies and measures contained therein, and offered by the trustees are legal, adequate, and customary to correct and protect the assets and rights of plan participants.

The proposed measures attempt to rectify serious and widespread mismanagement of the funds by its service providers and trustees over a period of many years.

I have serious concerns and doubts about many of the proposals. I feel available funds are targeted and biased, in some cases, to favor certain groups or categories of participants, when there is no such distinction made for participants, other than as a whole. I feel expenses to offset certain losses are borne inappropriately by participants. I address my concerns for your scrutiny here in no specific order or preference. I am enclosing personal information on my own account for your use, and ask you to protect its confidentiality to the best of your ability.

- The "Litigation & Re-Allocation Analysis" is the result of a limited seven-year investigation of a fund which is over thirty years old. Working from the year 1999 back to 1993, it corrects alleged misallocations of investment yield rates and previously posted interest amounts to participant accounts. It is noted that there are errors in every year investigated. My individual "participant account adjustment statement" (referred to on page 21 of the analysis) is attached as enclosure #1, and it reflects changes in my personal account end-of-year balances and posted investment yield interests every year of the investigation. During a statement review with the fund accountant and administrator (referred to on page 21 of the analysis) which took place on June 22, 2004, I stated that these yearly adjusted balances make it logical to assume the starting balance listed on my statement for January 1, 1993 "actual earnings" would also be changed had the investigation proceeded further. This makes this balance arbitrary and inaccurate. While not disagreeing with this, the accountant stated there would be no possibility of researching the fund previous to this time and this is the balance my adjustments would have to begin with. This is unfair to a thirty-year participant (in year 2000) like myself. My account adjustments between years 1993 and 1999 are a negative \$16,900. Had the investigation proceeded further, perhaps adjustments would have offset this negative figure to positive gains. Limiting the scope of the investigation is arbitrary and discriminatory.

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- Although the investigation, and its corrective adjustments, is limited to only seven years (1993 to 1999), expenses to the fund are applied proportionately to account balances. Long time participants, such as myself, pay a heavier share of the expenses, but receive only the same limited seven-year scope of the investigation. Would it not be more appropriate to apply expenses evenly for all participants with seven or more years of activity in the fund and a reduced proportionate amount to members involved a lesser time?
- My individual participant account adjustment statement (enclosure #1) shows my January 1, 1993 balance (after an adjustment to my end of year 1992 balance) as \$170,050.08. On this principal, the statement applied an "actual earnings" rate of yield of 7.88% to arrive at a corrected interest figure of \$14,799.35 for 1993. However, when the \$170,050.08 figure is actually multiplied by the 7.88% rate the interest amount should actually be \$13,399.94, \$1,400 less than the statement amount. The actual rate on the posted interest amount of \$14,799.35 would be 8.7%. I was told at my statement meeting of June 22, 2004, that this discrepancy is normal because interest is determined by the entire fund, not individual accounts. Past yearly statement, however, for my years 1997 and 1998 (enclosed here as examples in enclosure #2 and #3) reflect a much smaller percentage rate and interest dollar amount discrepancy; (\$45 in 1997 and \$40 in 1998 compared to the aforementioned \$1,400 difference in the "corrected" statement for year 1993). This discrepancy in 1993 does not provide confidence for me in both the accuracy of the statement and the fund investigation figures. I would be buoyed if accountants from your department review both the statement figures and the method the funds investment yield formula is computed, and that the investment yield is uniformly applied to all participant members.

\* I can find no record or statement for investment yield being applied to my account for the period of time January 1, 2001 to June 25, 2001. The last reflection of investment yield on my individual account statement (enclosure #1) is for year 2000, which was never previously applied until after the subject analysis meeting of April 26, 2004. Previous to the funds finances being turned over to New York Benefit Life Company, the annuity was an "annual investment yield based fund" and a statement similar to enclosure #2 and #3, rendered an accounting of this information to participants. Beginning June 26, 2001, the fund became a daily investment yield fund, with each day's activity available to participants on an Internet site. An example of my personal on-line statement is included here as enclosure #4, and notes an "opening balance" on June 26, 2001 of \$382,689.23. A letter dated June 25, 2001 from the fund administrator (enclosure #5) states in part, "your account will begin with your December 31, 2000 balance". At my "statement review meeting" of June 22, 2004 with the fund accountant, I asked why there was no posted yield for the January 1, 2001 to June 25, 2001 period of time. He informed me this investment yield was included in the on-line statement "opening balance". This would be contradictory of the fund letter (enclosure #5). No subsequent letter amending or correcting the funds June 25, 2001 letter was ever sent to participants. No Internet statement ever included a line item amount for this period of time. No partial yearly statement such as enclosure #2 and #3 was ever sent out for this period of time. Even if the fund letter of June 25, 2001 was in error as to the "opening balance" content, would the trustees or New York Benefit Life Company be so unprofessional as to cluster such a specific time period yield with contractor contributions, expense fees and market value changes into a "starting" figure? Aren't the participants due a better accounting of our yield balances than to be told, "...it's in there"?

• The "Litigation & Re-Allocation Analysis", "Summary of Recoveries & Savings" on page 2, lists a line item titled "fiduciary (mismanagement) insurer". The worth of this item is \$516,500. My "participant account adjustment statement" (enclosure #1) shows I received no account adjustment from this insurance policy I helped pay for from my participant expenses. Though I and all participants suffered losses as a result of fund mismanagement, the more than one-half million dollars will be used only to reimburse the fund from losses revealed in accounts of retired participants or participants without sufficient account balance to reimburse the fund for their account deficiencies. Nowhere in the by-laws of the funds are there distinctions or allowances to shower proceeds to one while withholding to another. This remedy is biased and discriminatory, and employed to eliminate trustee hardship or embarrassment to seek re-imburement from participants through litigation or personal appeals.

- The "Litigation and Re-Allocation Analysis Sequence of Events - 2001" (page 4), notes the termination of the accounting firm Marcum & Kliegman due to "unsatisfactory performance". Trustees and the fund accountant have evaluated this firm's work as "inept" and "incapable of completing their assignment". These opinions are contrary to an article in Long Island Newsday on July 27, 2003 titled "Tracking Down Wrong Numbers", where the firm of Marcum & Kliegman is described as expert in the field of forensic accounting. I question the following with regard to their termination in this matter:
  - ❖ Though it is required in schedule C, part II of the 5500 report, the trustees have never completed "Termination Information on Accountants and Enrolled Actuaries", or sent the required "Notice to Terminated Accountant" section to Marcum & Kliegman. Why?
  - ❖ The trustees have never directly requested a refund of the approximately \$85,000 of fund assets paid to Marcum & Kliegman for their unsatisfactory services. Why?
  - ❖ What instructions were given to Marcum & Kliegman in their "Letters of Appointment" from fund trustees when they were retained for service and how did they grossly violate them?
  - ❖ Why have the trustees, administrator and fund attorney refused access to the report that was issued that resulted in the termination of longtime fund accounting firm Lawson/Holland?
  - ❖ How is it possible for a reputable accounting firm such as Marcum & Kliegman to generate \$85,000 in bills for services without producing a single completed report of their findings or progress?
- In the Litigation and Re-Allocation Analysis Summary of Losses (page 1) there is mention of an IRS penalty applied to the Annuity Fund. Administration of this fund is the sole responsibility of the trustees and the service providers they choose to retain. With this in mind, I question the appropriateness of passing on this loss to the participant accounts. Reference the enclosed letter dated February 5, 1993 from the fund office, (enclosure #6), there is history of previous fund violations in the annuity fund loan program. In this particular case, there were fines passed on to the fund trustees from your department for the violations referred to in this communications. Many years later, however, trustees were re-imbursed for their personal monetary losses thru the general fund (dues) after a motion to do so by the then President, Robert Glaser, was passed.

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If this action is not illegal, it certainly undermines the purpose of penalties to trustees; to encourage them to be more stringent and responsible in following ERISA guidelines. If there are any forthcoming monetary penalties with regard to the alleged present mismanagement being considered, I hope your department will take whatever steps necessary to prevent a re-occurrence of participants and members having to bear this monetary burden of administration blunders, oversights and disregard, by either the trustees or the service providers that they are duty-bound to monitor.

The scope and magnitude of this investigation and the complexities involved with reconciling account balances over such a vast period of time have, I feel, overwhelmed most participants of these funds. We are for the most part, unfamiliar with the accounting principals and knowledge necessary to ascertain the accuracy and appropriateness of the actions taken and outlined in this re-allocation. The participants are the affected parties of this action, but we are not the responsible parties. Clearly it is thru the neglect and deceit of others that we now must seek your departments aid to scrutinize not only the areas I have questioned herein, but also any and all parts of this corrective process to insure our rights afforded under ERISA have been protected.

Thank you in advance for your diligence and concern.

Sincerely,

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## Wyche, Robert - OIG

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From: Kay, Jonathan - EBSA  
Sent: Tuesday, November 07, 2006 12:12 PM  
To: Castillo, Jose - EBSA  
Subject: Local 12 Asbestos Workers investigation

Jose:

As we discussed earlier today, effective immediately, I am directing that you:

1) Not initiate contact with anyone in the Office of Enforcement, Mr. Lebowitz's office or Brad Campbell's office regarding your views/opinions on the issues in this case. If you believe that you have a need to contact any such individuals on the merits of the case, please see me.

2) Not contact Mr. [redacted] without prior approval from Group Supervisor Robert Goldberg or Deputy Regional Director Jeff Gaynor.

3) 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.

If, as you mentioned, you have a need to bring EEO issues to someone's attention, there are appropriate people that you can contact.

Please advise me whether 1) you understand the three directions I have given you in this e-mail and 2) you intend to comply with each direction.

Finally, by e-mail earlier today I requested that you tell me whether you sent copies of our Nov. 3 Local 12 email addressed to me and cc'd to Nichelle Langone to any individuals in OE. You said that you would indicate whether you would provide me with a response once you received this email.

I again want to assure you that this office supports your development of the issues in this case wherever they may lead.

This message may contain information that is privileged or otherwise exempt from disclosure under applicable law. Do not disclose without consulting the Employee Benefits Security Administration. If you think you received this message in error, please notify the sender immediately.

6

This document is the property of the Employee Benefits Security Administration. Its contents are not to be disclosed to unauthorized persons.

<p>subject:</p> <p>Local Union 12 Asbestos Workers Annuity, Welfare, Pension, Vacation and Education Funds 25-19 43<sup>rd</sup> Avenue Long Island City, NY 11101</p> <p>EIN/PN: 13-6101711/011 11-6302784/501 51-6045262/002 13-5601667/502 11-3084552/</p>	<p>File Nos: 30-099939, 30-099940, 30-100130, 30-100460, 30-100551 (48)</p> <p>Program No.: 48</p> <p>Date: May 05, 2007</p> <p>By: Jose B. Castillo</p> <p>Status: ACTION</p>
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I. **PREDICATION**

This Report of Investigation ("ROI") discusses the violations relating to the Local 12 Asbestos Workers Annuity Fund (30-099939) ("Annuity Fund"), Local 12 Asbestos Workers Welfare Fund (30-099940) ("Welfare Fund"), Local 12 Asbestos Workers Pension Fund (30-100130) ("Pension Fund"), Local 12 Asbestos Workers Vacation Fund (30-100460) ("Vacation Fund") and Local 12 Asbestos Workers Educational Fund (30-100551) ("Education Fund") (the "Funds"). The same Trustees and Fund Administrator jointly manage the Funds. On February 15, 2002, a case on the Annuity Fund was opened as a result of a complaint by the Funds' Administrator that there were discrepancies regarding the allocation of investment returns by the former Funds' Administrator. Also, on February 15, 2002, a case on the Welfare Fund was opened as a result of an additional complaint by the Funds' Administrator regarding Fund participation by the former Funds' accountant and his family. On May 15, 2002, the Trustees filed a civil complaint in federal court against the former Funds' Accountant and Funds Administrator which resulted in a settlement in 2004. On October 8, 2002, a case on the Pension Plan was opened based on a complaint from a retired participant alleging that he was denied retirement benefits. After reviewing the retired participant's records it was determined that he did not earn enough points for entitlement to retirement benefits. The investigation of the three cases above remained open in order to monitor the settlement. Subsequently, on February 14, 2003, the New York Regional Office (NYRO) received a complaint from a participant alleging that all of the Funds were paying the Local 12 Asbestos Workers Union (the "Union") for collection services that the Union's Business Manager did not perform. (Exh. 2) As a result, on September 3, 2003, additional cases were opened on the Vacation Fund and Education Fund. Also, the initial review of the Funds' expenses in March 2004 disclosed that there were improper allocations of payroll audit fees, collection-related legal fees and financial audit fees. On May 3, 2005, a voluntary compliance letter was issued regarding the possible ERISA violations mentioned above. (Exh. 3)

Facts relevant to timeliness under Act Section 413 are as follows:

EBSA was not aware of the facts concerning the payments made by the Funds to the Union for collection services allegedly performed by the Business Manager prior to February 14, 2003, which is the date a participant complaint was received by the NYRO. Also, EBSA was not aware of the facts concerning the improper allocation of payroll audit fees, collection-related legal fees and financial audit fees prior to March 1, 2004, which is when the Funds expenses were first reviewed by the NYRO. However, as noted above, certain of the expenses at issue were incurred as early as 2000. There is a tolling agreement in effect which tolls the statute of limitations from July 17, 2006 until June 30, 2007. (Exh. 86). However, as of the above date, another tolling agreement was submitted to the Funds Trustees which would extend the statute of limitations to December 31, 2007.

<p>Distribution</p> <p><input type="checkbox"/> National Office</p> <p><input type="checkbox"/> RO File</p>	<p>Approval (Regional Director)</p>
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II. POTENTIAL JURISDICTION... PROBLEMS

None

III. BACKGROUND

The Funds are collectively bargained multi-employer plans established by the Union that provide benefits to members of the Local 12 - Asbestos Workers Union. The Annuity Fund was established on July 1, 1961, the Welfare Fund on January 1, 1953, the Pension Fund on January 1, 1964, the Vacation Fund on January 5, 1950 and the Education Fund on July 1, 1991. Effective December 31, 2001, the Vacation Fund merged with the Welfare Fund as a result of the transfer of all of the assets and liabilities of the Vacation Fund to the Welfare Fund.

All the Funds are funded by employer contributions. Members contribute to the Welfare Fund only.

The 2005 Forms 5500s and 990s for the Funds disclosed the following:

	Annuity Fund	Welfare Fund	Pension Fund	Vacation Fund	Education Fund
Type of Plan	Defined Contribution Pension Plan	Welfare Benefit Plan	Defined Benefit Plan	Vacation Benefit Plan	Training Plan
Type of Benefits	Annuity benefits	Medical, death optical, vacation, drug, substance abuse and disability	Retirement benefits	Vacation benefits	Provide training skills
Assets	\$72,469,269.00	\$10,225,270.00	\$35,085,805.00	See Welfare Fund	
Contributions	\$ 4,716,473.00	\$ 6,797,803.00	\$ 3,278,800.00		
Participants	610	535	790		

Plan Sponsor: Local Union 12 Asbestos Workers

Administration: Board of Trustees consisting of equal numbers of employer and Union trustees.

IV. BONDING, REPORTING AND DISCLOSURE, AND FIDUCIARY LIABILITY INSURANCE

A. FIDUCIARY LIABILITY INSURANCE

All the Funds are covered by a \$5 million fiduciary liability insurance policy issued by Ulico policy TFL-3808042 for the policy term 1/30/2007 to 1/30/2008. (Exh. 4)

B. REPORTING AND DISCLOSURE

The following Annual Reports (Form 5500) for the Local 12 Annuity Fund were filed:  
(Plus financial statements)

<u>PYE</u>	<u>Date Signed</u>	<u>Exhibit No</u>
12/31/00	7/24/02	76
12/31/01	unsigned	76
12/31/02	unsigned	76
12/31/03	5/21/04	76

12/31/04	6/13/05	76
12/31/05	7/18/06	76

The following Annual Reports (Form 5500) for the Local 12 Pension Fund were filed:  
(Plus financial statements)

<u>PYE</u>	<u>Date Signed</u>	<u>Exhibit No.</u>
12/31/00	unsigned	77
12/31/01	unsigned	77
12/31/02	unsigned	77
12/31/03	4/22/04	78
12/31/04	6/13/05	78
12/31/05	7/18/06	78

The following Annual Reports (Form 5500) for Local 12 Welfare Fund were filed:  
(Plus financial statements)

<u>PYE</u>	<u>Date Signed</u>	<u>Exhibit No.</u>
12/31/00	10/21/01	79
12/31/01	unsigned	79
12/31/02	unsigned	79
12/31/03	7/14/04	79
12/31/04	6/13/05	79
12/31/05	7/18/06	79

The following Annuity Reports (Forms 5500) for Local 12 Vacation Fund were filed:  
(Plus financial statements)

<u>PYE</u>	<u>Date Signed</u>	<u>Exhibit No.</u>
12/31/00	unsigned	80
13/31/01	unsigned	80

The following Financial Statements for Local 12 Education Fund were completed:

<u>PYE</u>	<u>Date Signed</u>	<u>Exhibit No.</u>
12/31/00	n/a	80A
12/31/01	n/a	80A
12/31/02	n/a	80A
12/31/03	n/a	80A

V. PLAN ADMINISTRATION AND FINANCIAL OPERATION

A. UNION TRUSTEES

Matthew Aracich

Nick Grgas

William Hofmann

Dennis Ippolito

John Paul Killard

Joseph Lapinski

EMPLOYER TRUSTEES

Edward P. Mahoney

Joseph P. Leo, Jr.

B. ACCOUNTANT

Schultheis & Panettieri, LLP  
210 Marcus Boulevard  
Hauppauge, NY 11788-3701  
(631)273-4778  
James Heinzman, C.P.A. - Partner

ATTORNEY for Accountant  
Thelen Reid & Priest LLP  
701 Eight Street, NW  
Washington, DC 20001-3721  
(202) 508-4000  
Sherwin Kaplan, Esq.

C. ATTORNEY for Union Trustees

Colleran, O'Hara & Mills LLP  
1225 Franklin Avenue, Suite 450  
Garden City, NY 11530  
(516) 248-5757  
Denis A. Engel, Esq.

ATTORNEY for Employer Trustees

Proskauer Rose LLP  
1585 Broadway  
New York, NY 10036-8299  
(212) 969-3008  
Ira M. Golub, Esq.

D. ADMINISTRATOR

Al Wassell  
25-19 43<sup>rd</sup> Avenue  
Long Island City, NY 11101  
SSN:  
(718) 937-3203

VI. REQUESTS FOR VARIANCES AND EXEMPTIONS

None.

VII. ISSUES AND FINDINGS

At all relevant times, the Local 12 Asbestos Workers Benefit Funds are administered by Fund Administrator Al Wassell. There are an equal number of Union and Employer Trustees of the Funds. The signatures of the Fund Administrator and one of the Trustees are required to authorize disbursements. Any disbursement over \$3,000.00 requires the signature of either Employer Trustee Joseph Leo or Edward Mahoney. Administrative expenses that involve all five Funds are paid by the Welfare Fund and subsequently allocated to each Fund. According to the Schultheis & Panettieri (S & P) letter dated March 29, 2004, which was faxed to EBSA, James Heinzman, a partner of the firm, indicated that the accounting assistance paid by the Funds for his services included the implementation of internal controls (Exh. 5). As a result of the internal controls being implemented, all payments should have been reviewed by the Fund Administrator. The Fund Administrator insures that each invoice or any other form of supporting documentation is reviewed for validity and accuracy and verifies that every payment is correct. (Exh. 5).

1. Improper Payment to the Union for Collection Services of the Business Manager (VC Letter Issue #1)  
ERISA Violations: Sections 404(a)(1)(A), (B), 406(a)(1)(D), (b)(1) and (2)

The investigation revealed that the Funds reimbursed the Union for collection services purportedly performed by the Union's Business Manager. Dennis Ippolito, the current Union Business Manager, stated during his September 16, 2003 interview that he performs the delinquent contractor collection function at least five (5) days a month by

making collection calls. (Exh. 6). He stated that he maintained some kind of record of the calls for only a short time but was unable to provide the investigator with the records. The investigation also revealed that the former Business Manager started this practice in 1996 and Mr. Ippolito continued it when he took over as Business Manager in November 2001. (Exh. 6) The NYRO's interviews of the former and present Fund Administrator indicate that they neither saw documents that proved that calls were made by the former and present Business Manager (Exhs. 7 & 8) Also, Mr. Ippolito indicated that he did not see any record or document to prove that the former Business Manager was making collection calls. (Exh. 6) The internal control that was implemented by Schultheis & Panettieri in 2001 would have required the Fund Administrator to insure that some form of documentation would have supported the reimbursement. (Exh. 5). However, reimbursement for undocumented collection activities continued until April 30, 2002, when the reimbursements stopped.

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

Year	Amounts
2000	21,169.32
2001	26,506.24
2002	8,785.26
<b>Total</b>	<b>\$56,460.82</b>

(Exh. 9) copies of checks and the spreadsheet.

**2. Improper Allocation of Payroll Audit Fees (VC Letter Issue #2)  
ERISA Violations: Sections 404(a)(1)(A) and (B)**

The investigation revealed that the Funds hired the accounting firm Schultheis & Panettieri, LLP to provide payroll audit services to the Funds with fees paid on an hourly rate. Review of the records disclosed that the fees are allocated among the five (5) Funds (Exh. 10). However, examination of the payroll audit results shows that seven (7) entities benefited from the audits. Besides the five Funds, 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 the CBA with the Funds, also benefited from the audits. Audit results show that the schedules created during the course of the audits clearly reflect allocation of employer contributions due to the seven (7) entities. (See samples of numerous payroll audit results and invoices from S & P). (Exhs. 11 & 12) Below is an analysis of the payroll audit fees that were improperly allocated to only the five (5) Funds and what the proper allocation should have been, to all seven (7) entities, the five (5) Funds, the Union and IIPF. This analysis is based on a pro rata portion of the total audit fees.

Payroll Audit Fees Paid by the Five Funds, 2000 to 2004	\$266,801.50
Allocation to 5 Entities	(divided by 5)
Payroll Audit Fees for each Fund	\$ 53,360.30
Payroll Audit Fees Paid by the Five Funds, 2000 to 2004	\$266,801.50
Allocation to 7 Entities	(divided by 7)
Payroll Audit Fees for each Fund	\$ 38,114.50
Overpayment by the Funds	\$ 15,245.80

**3. Improper Allocation of Legal Fees (VC Letter Issue #3)  
ERISA Violations: Sections 404(a)(1)(A) and (B)**



The investigation revealed that the Funds paid Colleran, O'Hara & Mills L.L.P. ("COM") legal fees for collection and other legal services. Review of the records shows that the legal fees were allocated among the five (5) Funds. However, the investigation disclosed that the legal services provided by COM included the collection of delinquent employer contributions that were due to the Local 12 Asbestos Workers General Fund, the Insulation Industry Promotional Fund (IIPF) and the five (5) Funds. For the years 2001 to 2003, the Funds paid a total of \$241,675 in legal fees for the collection of delinquent contributions. (Exh. 13) Below is a listing of the legal fee payments by year:

Year	Total Payments
2001	\$117,456.00
2002	\$ 66,320.00
2003	\$ 57,899.00
<b>Total</b>	<b>\$241,675.00</b>

(Exh 14) copies of checks issued to pay collection legal fees.

Below is an analysis of the legal fees that were improperly allocated to only the five (5) Funds and what the proper allocation should have been, to all seven (7) entities, the five (5) Funds, the Union and IIPF based on pro rata allocation of the legal fees among the seven entities.

Legal Collection Fees Paid by the Five Funds, 2001 to 2003	\$241,675.00
Allocation to 5 Entities	(divided by 5)
Legal Collection Fees for each Entity	\$ 48,335.00
Legal Collection Fees Paid by the Five Funds, 2001 to 2003	\$241,675.00
Allocation to 7 Entities	(divided by 7)
Legal Collection Fees for each Entity	\$ 34,525.00
Overpayment by the Funds	\$ 13,810.00

**4. Undocumented Investment Analysis Billings (VC Letter Issue #6)  
ERISA Violations: Sections 404(a)(1)(A) and (B), 406(a)(1)(C) and (D)**

The investigation revealed that seven S & P auditors, other than James Heinzman, billed the Funds for "accounting assistance" charges. (Exh 28). However, Heinzman stated during his November 10, 2004 interview that he was the only one that provided accounting assistance to the Funds' bookkeeper Veronica Saunders. (Exh. 15) He stated that the rest of the auditors actually performed investment analysis functions that were invoiced as "accounting assistance." Heinzman further stated that the Fund Administrator, Al Wassell, was consulted concerning the work that these auditors were performing, accounting assistance, but he did not explain that they would actually be performing investment analysis. Also, during his interview, Heinzman was asked to provide the investigators with copies of the investment analysis documents. He indicated that there were no investment analysis documents in his possession nor were there any work papers that any of the other S & P auditors had that would have shown the analysis work that they performed. He further stated that the documents were provided to the Fund Administrator. However, Heinzman has never explained what S & P did as far as the investment analysis. He also stated that the investment analysis procedure is done so that the bookkeeper can use the information to make bookkeeping entries on the Funds' accounting records. (Exh. 15).

In a January 19, 2006 meeting with Heinzman, he told investigators that in 2001, S & P created the Local 12 Benefit Funds investment tracking system. (Exh. 16). The system purportedly generated or printed investment analysis reports on an on-going basis all year round. Heinzman presented the investigators with what he claimed were investment analysis documents. (Exh.16) However, after review of the documents it was

determined that there was no proof that they were created by S & P. In fact, the investment statements were created by the Bank of New York. (Exh. 17) In addition, at the June 19, 2006 meeting, Heinzman made the following additional statements: (1) the investment analysis documents done by the S & P auditors do not identify specifically who actually performed the work; (2) the Funds' bookkeeper, Veronica Saunders, was not aware of the investment adjustments that were done by the auditors; and, (3) as a result of S & P investment analysis work, the Circle Trust discrepancy of over \$500,000 regarding the Local 12 Annuity Fund, was discovered in 2002. (Exh. 16). However, in reality, this discrepancy was discovered and corrected by Circle Trust. (Exhs. 18 & 19)

In the interview of Al Wassell on 12/21/2004, he was asked about the validity of the investment analysis charges and he stated that he gave the bookkeeper permission to call S & P whenever she needed accounting assistance. (Exh. 20). However, he was not able to show any proof that he was consulted or aware that other S & P auditors were providing investment analysis services. Al Wassell added that he did not have any documents or see any documents to proof that these services were performed. (Exh.20). Nor was Wassell otherwise aware that such services were being provided to the Funds. (Exh. 20). However, in his June 29, 2005 response to the voluntary compliance letter, counsel for S & P alleges that Wassell was all documents related to the investment analysis project. (Exh. 87 at p.4). The Trustees' response to the voluntary compliance letter is forwarded herewith as Exhibit 88.

Dennis Ippolito, the Business Manager of Local 12 and one of the Trustees of the Funds, stated in his December 21, 2004 interview that the bookkeeper was not familiar with the investment analysis that S & P performed and he did not know whether the trustees were consulted regarding the services that S & P performed. (Exh. 21) The bookkeeper, Veronica Saunders, in her interviews dated August 24, 2004 and August 24, 2005, stated that the Fund Administrator told her to always call S & P auditors whenever she encountered any accounting problems. (Exh. 22). However, she stated that the monthly accounting entry of investment gains and losses she enters into the Funds' accounting records, comes directly from the statements of the investment providers and not from S & P. She added that these financial records are mailed from the investment providers directly to the Fund office. Further she stated that she did not need the assistance of the auditors when entering investment adjustments into the accounting records. (Exh. 22)

S & P have not provided the Department with any documents created by its investment tracking system. The documents they have presented as investment statements are, in fact, audit work papers from their financial audits. The Department has made numerous requests asking for documents regarding their investment tracking system, including a request in a subpoena, however, the documents have yet to be provided to the Department. (Exh. 72) Supposedly, these investment analysis documents are not needed nor used by the bookkeeper. (Exh.22)

S & P auditors who billed the Funds for these investment analysis services are identified on the S & P invoices, however, the investment analysis documents created do not identify which auditors performed the work. (Exh. 17). Also, according to the statements of the Trustees and Fund Administrator, they were not made aware that these services were being performed. (Exhs. 20 & 21) Review of the minutes of the Board of Trustees' meetings show that James Heinzman was almost always in attendance. (Exh. 23) Yet, he failed to inform the Trustees of the services that he and seven (7) other auditors performed and billed for. (Exh.28). The financial audit engagement letters indicated that on certain occasions where there is a special project needed outside of the scope of the services listed in the engagement letter, S & P will consult the Fund Administrator regarding those services and the fees to be charged before proceeding. (Exh. 24)

There has been no proof provided that shows that the information from the investment analysis that S & P performed was used for updating the Funds' accounting records. In his November 10, 2004 interview, James Heinzman indicated that there were no investment analysis documents in his possession. Yet, at the January 19, 2006 meeting he had with the Department, he stated that S & P maintains the Local 12 Benefit Funds investment analysis tracking system that they created in 2001, and the system had produced reports and currently produced reports for the Funds on an on-going basis. (Exh.16)

On November 29, 2005 Heinzman provided the Department with documents claiming that they were the results of the investment analysis work performed by the other S & P auditors despite telling the investigators back in his November 10, 2004 interview that there were no investments analysis documents at S & P. The NYRO's review of these documents shows that they were created during the financial audit process, not done as a separate investment analysis procedure, and were supported by documents generated by the financial institutions holding the investments. The NYRO, in part, bases its conclusion that these documents were prepared during the financial audit on the fact that the invoices list service code "001" which denotes financial audit charges. (Exh.26). Also, the documents presented by Heinzman only pertain to the Annuity Fund. (Exh. 25) However, the investigation shows that the Pension, Welfare and Education Funds were also billed for accounting assistance charges that Heinzman now states was investment analysis work. Below is a summary of the documents presented by Heinzman on November 29, 2005:

Description of the documents	What the Invoice show
Spreadsheets or schedules created to verify the correctness of the investments as reflected on the financial statements and accounting records. Supported by copies of financial statements or part of the financial statements from investment custodians. The annotations on the pages indicate audit steps were performed by the auditors. There is no indication of any analysis done. (Exh. 25)	<b>Billed as service code 001, which means financial audit charges. (Exh. 26)</b>
E-mails between the auditor and the financial custodian of the investments supported by a listings of the investment options. The communications show that the auditor was trying to reconcile the investment transaction which is an ordinary audit procedure. There is no indication of any analysis done. (Exh.19)	<b>Billed as service code 001, which means financial audit charges. (Exh. 27)</b>
Investment statements generated by the financial custodian. The first three pages show annotations which indicate audit procedure notes. There is no indication of any analysis done. Also, auditors who purportedly performed the investment analysis are unidentifiable due to the absence of any initials. These groups of documents were part of numerous boxes of documents that were presented to the investigators as investment analysis during their Funds' office visit on January 19, 2006. During this presentation, Mr. Heinzman stated to the investigators that these documents do not identify which auditors performed the investment analysis. (Exh. 16)	Can not be verified against any invoices due to the absence of any initials.

Below is a summary of the unsubstantiated investment analysis performed by S & P and charged the Local 12 Benefit Funds. Although undocumented, the number of hours billed by Heinzman for providing the bookkeeper with accounting assistance are not included and are considered acceptable.

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>

(Exh. 28)

**5. Undocumented and Improper Accounting Fee Billings (VC Letter Issue #8)**  
ERISA Violations: Sections 404(a)(1)(A) and (B) and 406(a)(1)(C) and (D)

The investigation disclosed that in June 2001, the Funds paid S & P \$31,310 for financial audits and secretarial services performed in May 2001 by several auditors and secretarial staff. (Exh.46). However, the payments that were made involving these particular invoices issued by S & P, have no supporting documentation. (Exh. 29) During the course of the investigation, it was noticed that all of the other payments made to S & P involved invoices that had supporting documentation which included, the names of the auditors/secretaries, the number of hours, the hourly rates, the description of the services performed and the dates the services were performed. This supporting documentation was described as the "Detail Work In Process Report". (Exh. 30) The Fund Administrator paid these invoices without having supporting documentation. In his July 19, 2004 interview, Heinzman, who was the managing partner and was mostly in charge of the financial audits of Local 12 Funds, told the investigator that the supporting documentation for the May 2001 financial audit work was probably not included with the invoices when the invoices were submitted. (Exh. 31). Heinzman further stated that he would create the supporting documents by extracting them from the pertinent auditors' payroll records payroll and mail them to the Department. (Exh. 31) On August 3, 2004, the Department received the documents mentioned above by Heinzman. (Exh.32). They consisted of a spreadsheet listing the names of the auditors and the hours that they billed. In his November 10, 2004 interview, Heinzman stated that all of the hours that he charged were for supervisory functions and that there were no supporting documents to prove that he performed those functions. Also, during the same interview, he stated that the audit work papers would not show the work of other auditors that billed the Funds. Heinzman added that supporting documentation for the May 2001 payments would have been attached to the invoices. (Exh. 33)

Fund Administrator Al Wassell confirmed during his December 21, 2004 interview that there were no supporting documents when the invoices were submitted. (Exh. 34) Dennis Ippolito, the Local Union 12 Business Manager and a Union Trustee to the Funds, stated in his December 21, 2004 interview that he was not aware that the initial invoices submitted by S & P were without supporting documentation. (Exh. 35)

Detailed review of the audit work papers and audit plans disclosed that the only auditor that can be identified as having performed any audit work in May 2001 was Sharon Haddad. Ms. Haddad performed several audit procedures that benefited all of the Funds. (Exhs. 47, 48, 49, 50 & 51) Based on the hours billed, the audit procedures should have been completed by the middle of the May. However, the audit work papers show that the bulk of the work was done in the month of June. In his July 19, 2004 interview, James Heinzman confirmed that Ms. Haddad performed financial audits for the Funds in May of 2001. (Exh. 31)

At a January 30, 2006 meeting, Trustees counsel proposed and the investigators agreed that S & P auditors would submit affidavits to document the functions they performed in May 2001. (Exh. 36) Also, at the June 29,

2006 meeting, the Trustees counsel agreed to submit written descriptions of the financial audit work that S & P performed during May 2001. (Exh. 37) However, to date, no affidavits or written descriptions were submitted.

Despite the hours invoiced by S & P, there appear to be some significant financial discrepancies which prompts one to question whether all of the work S & P claims it performed was, in fact, performed. For example, the investigation disclosed that the Annuity Fund had a Certificate of Deposit (CD) with Citibank which S & P's audit work papers show was liquidated in March 2000. (Exh. 38) The bank statement shows that the CD was valued at \$612,860.69 when it was closed on March 15, 2000. (Exh. 39) After reviewing the audit work papers and the financial statements it appears that they do not provide any indication what happened to this money after March 2000. In fact, the CD proceeds were deposited in a Fund account at Citibank and then transferred to a Fund account at Fleet Bank. However, neither S & P's work papers, nor the financial statements S & P prepared make any reference to the initial deposit of the CD proceeds into a Fund Citibank account.

The investigation also disclosed that the financial statements as of December 31, 2000 show that outstanding participant loans were \$2,756,494.00. However, review of the audit work papers with supporting documentation shows that participant loans were \$3,807,025.24. One audit work paper indicated that there was an amendment that occurred with audit notations showing that it was done on February 27, 2001. (Exh.42) Another audit work paper shows the amount was \$3,807,621.70. This particular document is actually a statement from New York Life. (Exh. 43) The audit work papers mentioned above do not have any notations to indicate adjustments to equal the \$2,756,494 reflected in the financial statement. The additional documents that appear to be related to participant loans do not support the amount that was stated in the financial statements. (Exh.44) The difference between the \$3,807,621.70 on the New York Life statement ending December 31, 2000 and the \$ 2,756,494.00 in the financial statements as of December 31, 2000 is \$1,051,127.70. This difference is not documented in the financial statements. (Exh. 41) It also presents a materially significant transaction that should have been reflected on the audit.

The facts presented above demonstrate that critical and important financial data of the Annuity Fund's financial activities in 2000 were not properly reviewed during the financial audits despite the involvement of six (6) auditors, including Audit Manager James Heinzman. There were large amounts of hours charged, many of which were undocumented. The Independent Auditors' Report for plan year 2000, dated August 2, 2001, and the accompanying financial statements clearly indicate that the audit was conducted in accordance with auditing standards generally accepted in the United States. This report further stated that the audit was performed to obtain reasonable assurance about whether the financial statements are free of material misstatement. Also, the report provided an opinion that the financial statements present fairly in all material respects the net assets available for benefits of the Annuity Fund for plan year 2000. (Exh.45)

Below are the unsubstantiated billings:

Auditor	Worker Performed	Rate	Hours Billed	Amount
Haddad	Audits	\$ 90.00	55.50	\$ 4,995.00
Heinzman	Supervisory 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>Totals</b>			<b>356.25</b>	<b>\$ 31,310.00</b>

(Exh. 46)

**6. Excessive and Undocumented Billing for Post-Audit Service (VC Letter Issue #10)  
ERISA Violations: Sections 404(a)(1)(A), (B), 406(a)(1)(C) and (D)**

The investigation revealed that after completion of the audit field work (issue date) and after presentation of the report to the Trustees (release date) and completion of the Form 5500 and the financial statements for plan years ended 2000-2003, S & P continued billing the Funds for financial audit and secretarial services. Review of the Form 5500s/990s, the financial statements and reports for all the Funds, shows no changes or modifications that occurred after the issuance and release dates of the reports. A reasonable amount of additional audit work and secretarial services would be needed if there were modifications and/or changes in the audit reports and financial statements. Also, additional audit work and secretarial services would generate additional audit work papers and related documents. The additional documentation should be part of audit work papers for all the Funds. However, with the exception of one document, there is no additional documentation to justify the large number of additional hours billed on these audits. The audit reports, financial statements, supplemental schedules and the notes to the financial statements are complete and finalized at issuance date. (Exhs. 76, 77, 78, 79, 80 & 80A)

Further, the investigation recognized that additional post-audit billings are necessary. However, in this situation, the additional hours billed are excessive and undocumented. The summary of the time frames associated with the financial statement audits along with a description of the codes that were on the supporting documentation attached to the S & P invoices are being provided. (Exh. 52). EBSA's Office of Chief Accountant was consulted regarding post-audit billings (Exh. 53) and stated, in part,

"It is common practice for auditors (and accountants) to develop a budget, even for new clients. As part of the bidding process, accountants review the accounting system of the prospective client and, using their own experience with similar clients, develop a budget for total expected hours to be spent on the engagement. Usually, this budget is detailed in major functions, including Audit Planning, financial statement drafting and typing, field work, post-field work hours (subsequent events review, housekeeping file work, etc) and tax work. Even if the billing is on an hourly basis, I'd imagine that a budget is necessary to 1) prevent runaway charging, and 2) use that information for an accounting firm level plan of professional staffing assignments." (Exh. 53).

Below, are examples of a number of occasions in which EBSA concluded excessive and undocumented charges occurred:

**Annuity Fund:**

The audit of the Annuity Fund started in December 2003 and by January 29, 2004 the report was issued. During this period, the Annuity Fund was billed for 266.75 hours of financial audit charges. (Code 001) Review of the invoices show that an additional 209.75 hours were billed after the report was issued. (Table 4) However, there is no documentation to support the additional hours charged. The audit report indicated that at issue date, the report was completed and all financial data was finalized, including all attachments and notes to the financial statements. (Exh. 76). There are no amendments or additions that required that many more hours of audit work was needed. After the report was released to the Trustees on May 20, 2004, an additional 27.35 hours were billed for additional financial audit and secretarial work. (Table 6)

**Pension Fund:**

The Pension Fund audit started in December 2003 and by January 29, 2004 the report was issued. During this period, the Pension Fund was billed for 187.75 hours of financial audit charges. (Code.001) Review of the invoices show that an additional 224.75 hours were billed after the report was issued. However, there is no documentation to support the additional hours charged. The audit report indicated that at issue date, the report was completed and all financial data was finalized, including all attachments and notes to the financial statements (Exh. 78) There are no amendments or additions that required that many more hours of audit work was needed. After the report was released to the Trustees on April 16, 2004, an additional 53.60 hours were billed for additional

financial audit and secretarial work. In this situation, the Pension Fund was billed for more hours after the issuance of the report (224.75 hrs), than the hours billed for the actual field work (187.75 hrs). (Table 4)

Welfare Fund:

The Welfare Fund audit started in December 2003 and by January 23, 2004 the report was issued. During this period, the Welfare Fund was billed for 255 hours of financial audit charges. Review of the invoices show that an additional 189.35 were billed after the report was issued. (Table 4) There was neither additional documentation nor amendments to justify these additional hours. The audit report indicated that at issue date, the report was completed and all financial data was finalized, including all the attachments and notes to the financial statements. (Exh. 79 ) After the report was released to the Trustees on June 24, 2004, an additional 75.35 hours were billed for audit and secretarial work. (Table 6) In this particular situation, after the audit report was forwarded to the Trustees, either by mail or at a Trustees meeting, the Fund was billed for additional hours equivalent to a full week of work.

Education Fund:

A review of the financial audit charges billed to the Education Fund from 2000 through 2003 provided the following information. The Education Fund was billed for 71.5 hours for the audits in 2001. This was the initial engagement of S & P which understandably required additional time due to the purportedly problems encountered. However, for the next three (3) annual audits, the number of hours billed increased yearly. By 2003, the number of hours billed more than tripled the number of hours billed in 2000. There is no proof that the subsequent financial statements of the Education Fund became more complicated compared to 2000. Below is a summary of the facts:

**Table 1**

Plan Year	2000	2001	2002	2003
Hours	71.5	96	89	221.5
Amount	\$6,410.00	\$8,534.00	\$9,421.00	\$19,664.00

Comparison of S & P's Charges to Local 12 Funds with Charges to Other S & P Clients

A comparative analysis of the financial audit fees charged by S & P to the Annuity Funds of Local 12, Local 137 and the Sheet Metal Workers is summarized below:

**Table 2**

Annuity Fund	2002	2003	Participants	Assets
Local 12	\$42,050.00	\$41,500.00	550	\$53,389,228.00
Local 137*	\$18,970.00	\$22,293.00	1196	\$96,652,430.00
Sheet Metal Wks*	\$21,500.00	\$21,500.00	590	\$23,782,490.00

\* Both Local 137 and Sheet Metal Workers Annuity Funds are on a retainer agreement based on flat fee.

The number of financial audit procedures required to be undertaken by auditors normally relates to the total amount of the fund's assets and the number of investment accounts/options that are maintained. In the usual scenario, when a fund has larger assets, it also has more investment options/accounts. Prudence dictates that a fund that has large assets requires more investment options/accounts than a fund with much smaller assets. Likewise, a fund that has a much larger number of participants requires more audit procedures compared to one that has a much smaller number of participants. Audit procedures will require auditors to review more remittances and delinquency reports of a fund that has a much larger number of participants compared to one that has a smaller number of participants. In the situation regarding the Local 12 Annuity Fund, our review indicated that S & P billed the Annuity Fund more hours compared to its other client on a flat retainer fees. (Table 2) Also, the investigation disclosed that a number of auditors that were not involved in the actual audits billed the Funds for financial audit charges. (Table 8)

According to the July 19, 2004 interview of James Heinzman, the vast majority of S & P clients are on a retainer agreement under a flat rate fee. He stated that the Local 12 Benefit Fund Trustees did not inquire about a flat rate fee arrangement and admitted that he may have overlooked to mention the flat rate basis to them. (Exh. 31). Interviews of the Fund Trustees and the Fund Administrator show that there was no monitoring of the hourly costs of the financial audits and that they did not inquire about the accelerating costs. (Exhs. 34 & 35)

The financial audit engagement contracts for all the Funds were initially based on hourly rates when it started in 2001. However, after 2001, it remained on an hourly rate and despite being in attendance at every trustees' meeting, S & P auditors did not make the Trustees aware that their rate could be change to a flat fee basis. After 2001, the cost of the financial audits kept on accelerating and it appeared that there was no budget made for the annual cost. Also, after the 2001 audits, all the recognized problems that occurred in gathering the financial information during the initial engagements were solved. There is no proof that any problems existed in the 2002 audits and audits for the subsequent years. However, the overall audit cost for 2002, 2003 and 2004 increased.

In his November 11, 2004 letter, which was in response to the interview the Department conducted of him on November 10, 2004, S & P managing partner Vincent F. Panettieri listed numerous additional procedures that needed to be performed subsequent to the last day of field work, which is the date that appears on the audit report, and prior to the issuance of financial statements. (Exh.54). However, Mr. Panettieri did not state which additional procedures were actually done and provided no documentation to proof that these procedures were actually performed. (Exh.54) Mr. Panettieri provided the Department with a copy of Chapter 6, Concluding The Audit from the "Guide to Audits of Employee Benefit Plans", which contains a list of additional procedures that are necessary. (Exh. 55)

Yet, despite all of these required procedures, there appear to be significant audit omissions/discrepancies which again, raise questions about whether S & P performed all the work they claimed they did. For example, the NYRO's review of the financial statements, notes to the financial statements and audit work papers of the Annuity Fund for 2002 showed no information or data addressing the status of the \$1,401,997 cash account. This was deposited into the interest bearing cash account with the Bank of New York. The financial statement for 2000 shows that by the end of December 31, 2000, the cash account balance was \$183,527. (Exh. 61) In 2001, the cash account balance went up to \$1,401,997. (Exh.62). The 2002 financial statements showed that this account does not exist anymore. (Exh. 63) The audit work papers do not contain any data or information to explain the status of this account. Review of the Fund's account statement for 2002 with New York Life likewise does not show any transaction to indicate that this money was deposited in this account. (Exh.64)

The summary presented above shows that audit procedures performed by S & P auditors failed to identify or recognize the importance of showing the audit trail of this particular transaction. Despite their claim of additional audit work needed including performing additional audit procedures, it appears that this materially significant accounting data was not discovered.

Also, the investigation disclosed that from plan year 2000 until plan year 2004, there was a discrepancy in the amount of participant loans as reflected on the financial statements and the amounts stated on the New York Life Annual Trust Reports. (Exhs. 65 & 66) The discrepancy between the two statements appeared to have continued in 2005. There is no note to any of the financial statements to address the discrepancy and there is no audit notation in the audit work papers to indicate any adjustment that ties the amounts together. The difference between the two amounts is materially significant and causes the Fund's assets in the financial statements to be understated each year. Also, it portrays a condition that could mean something is materially wrong. Below is the summary:

**Table 3**

<i>Plan Years ending</i>	<i>Per New York Life</i>	<i>Per Financial Statement</i>	<i>Difference</i>
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<i>December 31,</i>			
2000	\$3,807,627.70	\$2,756,494.00	\$1,051,133.70
* 2001	\$3,629,977.97	\$2,048,639.00	\$1,581,338.97
2002	\$3,709,951.11	\$1,841,023.00	\$1,868,928.11
2003	\$4,019,518.62	\$1,575,263.00	\$2,444,255.62
**2004	\$4,403,404.79	\$1,861,367.00	\$2,542,037.79

\* 2001 audit work papers do not contain any statement from New York Life.

\*\* 2004 audit work papers were not requested.

(Only the 2002 and 2003 audit work papers have the New York Life Statements) (Exh. 67)

On January 23, 2006, S & P provided the NYRO with a set of documents showing that additional work was performed for the Annuity Fund after the March 12, 2002 issuance of the audit report. These documents included a letter from S & P dated April 26, 2002 informing the Trustees of the discrepancies noted during the audits. In addition, there were e-mails dated March 26, 2002 to and from Auditor Murray to Circle Trust, who was the custodian of the Funds assets in 2001, asking questions about the Fund's assets. The documents indicate that the \$500,000 discrepancy was discovered and corrected by Circle Trust. (Exh. 68) The financial audit hours billed to the Annuity Fund for the work associated with the documents presented, are considered documented and therefore allowed. So far, these are the only documents provided by S & P in support of its additional financial audits billings for all the Funds after the issuance of the audit reports. The invoice for the month of March 2002, show that Auditor Murray billed the Fund for a total of 60.5 hours of additional work after the issuance of the audit report on March 12, 2002. The Annuity Fund spreadsheet detailing what we determined as undocumented audit charges does not include the hours billed by Auditor Murray. (Exh. 8)

On March 8, 2006, S & P provided EBSA with another response to the request for additional documents to prove that the additional hours of financial audit billings were reasonable. However, this response did not contain any additional documents that supported the work product regarding the additional financial audit charges. (Exh. 69)

In the June 29, 2006 interview of James Heinzman, S & P counsel agreed to set up a date for the investigators to review the purported additional financial audit work papers at S & P. (Exh. 70) However, subsequent e-mails from S & P counsel verified that there were no additional financial audit work papers that would support the additional hours billed to all the benefit funds after the issuance of the audit reports. (Exh. 71)

On December 7, 2006, subpoenas were issued to both S & P and the Fund Administrator to produce documents regarding the issues in the voluntary compliance letter dated May 3, 2005 including, supporting documents for the investment analysis services that were charged as accounting assistance, and additional audit work papers that were generated as a result of the financial audit charges that were billed after the issuance of the audit reports. However, no additional documents were produced. (Exh. 72)

Below are the tables summarizing all the excessive and undocumented billings:

- 1) Additional hours of financial audit and secretarial service charges billed after the issuance of the audit reports and completion of the financial statements:

**Table 4**  
**In terms of number of hours**

Year Billed	Annuity Fund	Pension Fund	Welfare Fund	Vacation Fund	Education Fund	Totals
2001	69.25	58.50	132.25	64.50	38.25	362.75
2002	125.00	27.50	50.25	0.00	25.25	228.00
2003	158.00	99.00	72.00	0.00	17.25	346.25

2004	209.75	224.75	189.35	0.00	33.20	657.04
Total						1,594.04

**Table 5**

**In terms of dollar amounts**

Year Billed	Annuity Fund	Pension Fund	Welfare Fund	Vacation Fund	Education Fund	Totals
2001	\$ 4,236.25	\$ 4,467.51	\$13,882.75	\$ 5,130.00	\$2,068.75	\$29,785.26
2002	\$9,575.00	\$ 1,877.50	\$ 4,723.75	0.00	\$ 726.25	\$16,902.50
2003	\$10,985.00	\$11,215.00	\$ 7,915.00	0.00	\$1,752.50	\$31,867.50
2004	\$19,245.00	\$17,647.50	\$13,866.25	0.00	\$3,755.00	\$54,513.75
Total						\$133,069.01

The Vacation Fund was merged with the Welfare Fund in Plan year 2001.

- 2) Below, are additional hours of financial audit and secretarial service charges that were billed after the audit reports and the financial statements were released to Trustees:

**Table 6**

**In terms of number of hours**

Year Billed	Annuity Fund	Pension Fund	Welfare Fund	Education Fund	Totals
2001	5.50	8.00	4.50	1.50	19.50
2002	31.75	38.75	40.75	0.00	112.75
2003	9.50	5.50	8.25	4.00	27.25
2004	27.35	53.60	75.35	31.35	187.65
Total					347.15

**Table 7**

**In terms of dollar amounts**

Year Billed	Annuity Fund	Pension Fund	Welfare Fund	Education Fund	Totals
2001	\$ 192.50	\$ 600.00	\$ 157.50	\$ 52.50	\$ 1,002.50
2002	\$ 2,263.75	\$2,423.75	\$3,071.25	\$ 726.25	\$ 8,485.00
2003	\$ 190.00	\$ 220.00	\$ 280.00	\$ 160.00	\$ 850.00
2004	\$2,218.75	\$4,331.25	\$5,950.00	\$2,396.25	\$14,896.25
Total					\$25,233.75

- 3) Below, are the hours of financial audit charges that were billed by the S & P auditors that were not involved in the audits. Most of the charges were billed before the actual start of the audit engagements/fieldwork:

**Table 8**

**In terms number of hours**

Year	Annuity Fund	Pension Fund	Welfare Fund	Vacation Fund	Education Fund	Totals
2001	0.00	8.00	0.00	5.50	7.50	21.00
2002	22.50	69.25	18.00	0.00	0.00	109.25
2003	42.50	17.50	28.00	0.00	0.00	88.00
2004	44.00	57.75	93.25	0.00	33.20	228.20

Total						446.95
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**Table 9**  
In terms of dollar amounts

Year	Annuity Fund	Pension Fund	Welfare Fund	Vacation Fund	Education Fund	Totals
2001		\$ 600.00	0.00	\$ 487.50	\$ 262.50	\$ 1,350.00
2002	\$ 1,690.00	\$4,338.75	\$1,010.00	0.00	0.00	\$ 7,038.75
2003	\$2,167.50	\$2,062.50	\$2,515.00	0.00	0.00	\$ 6,745.00
2004	\$3,897.50	\$4,912.50	\$8,172.50	0.00	\$3,755.00	\$20,735.50
Total						\$35,871.25

The above spreadsheets detail all of the undocumented and excessive billings. The spreadsheets do not include a reasonable number of hours (summarized in Table 10, below) that one would expect to be billed after the issuance of the audit reports. These hours, although undocumented, were deemed as necessary additional post audit work and are therefore legitimate billings. (Exhs. 84 & 85)

**Table 10**

Number **undocumented** financial audit work hours billed allowed for post-field work

Year Billed	Annuity Fund	Pension Fund	Welfare Fund	Vacation Fund	Education Fund	Totals
2001	23.00	40.75	19.00	28.75	39.00	150.50
2002	15.00	8.5	9.0	0.00	41.5	74.00
2003	84.00	21.00	23.00	0.00	27.5	155.50
2004	43.50	44.00	36.5	0.00	11.5	135.50
Total						515.50

Also included, as examples, are the invoices paid by the Funds. Attached to the invoices are the "Detail Work in Process Report" supporting documents that were prepared by S & P. It contains the names of the auditors and other staff that billed the Funds for their services, the number of hours charged, the rate and the type of service provided. The code 001 and 091 (audit of financial statements and secretarial services), are being cited on the billings. (Exhs. 84 & 85)

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<b>Subject:</b> Local Union 12 Asbestos Workers Annuity and Welfare Funds 25-19 43 <sup>rd</sup> Avenue Long Island City, NY 11101  EIN/PN: 13-6101711/011 11-6302784/501	File Nos: 30-99939 & 30-099940  Program No.: 48  Date: November 30, 2007  By: Jose B. Castillo  Status: ACTION
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III. BACKGROUND

The Annuity Fund had five hundred twelve (512) participants with account balances as of December 31, 2000. Allocation of the investment earnings was done at each valuation date as required by the Plan Document. (Exh. 90, page 7) The valuation date is normally the date the financial audit is completed and investment earnings or loss is determined. Prior to June 26, 2001, when the Annuity Fund became self-directed, it was administered by the Fund Trustees through Reynolds Securities, an investment consultant.

In August 2000, New York Life became the record keeper and financial custodian of the Annuity Fund. By September 2000, the Annuity Fund assets were transferred from the Bank of New York to New York Life. When the assets were transferred, the Annuity Fund Trustees did not provide New York Life with the total participants' accounts balance.

On January 8, 2002, the NYRO received a letter from Albert Wassell, the Fund administrator, advising the NYRO that the Fund Trustees have discovered discrepancies in several areas that involved the former Fund administrator and/or the former Fund accountant. (Exh. 91) On May 15, 2002, the Fund Trustees filed a civil complaint against Robert Weinstein, the former Fund auditor, and Jerome Market the former Fund administrator. The complaint alleged that these individuals participated in a scheme to defraud the Funds of several hundreds of thousands of dollars and that the yearly investment earnings were misallocated. (Exh. 92)

On May 24, 2002, the NYRO received a letter from Funds' counsel, Colleran, O'Hara & Mills, advising the NYRO of the status of the complaint. Copies of the special projects that were performed by Fund accountant Schultheis & Panettieri, which resulted in the discovery of certain discrepancies, were also enclosed. (Exh. 93)

The complaint was settled on November 22, 2002 in which the defendants Weinstein and Market agreed to pay monetary settlements. (Exh. 94) The Funds immediately received the fidelity bonding claim settlement on November 25, 2002. The fiduciary bonding claim settlement was received in September 2003. (Exh. 95)

On November 7, 2005, the NYRO received a letter dated November 1, 2005 from participant . His letter listed several issues including the correctness of the allocations of his investment earnings and insurance settlement payments from the civil complaint filed against the former Fund administrator and Fund accountant. (Exh. 96) The NYRO was not aware of the facts concerning the allocation of the investment earnings for 2000 prior to November 7, 2005.

1. The Annuity Fund Trustees used a portion of the Annuity Fund's 2000 investment earnings as part of the \$1,555,604.77 employer contribution transmittal dated October 19, 2001 in violation of ERISA Section 404(a)(1)(A) (ii), (B) and (D), 406(a)(1)(D) and 406(b)(1) and (2).

The investigation disclosed that the Annuity Fund earned investment earnings of \$374,768 for the period from September 1, 2000 through December 31, 2000 under New York Life, the new Annuity Fund custodian. The earnings were placed by New York Life into a suspense account (a frozen account) awaiting instructions from the Fund administrator on how to allocate it to participants. (Exh. 97) The second page of Exhibit 97 shows that these earnings were recorded by New York Life in a separate account from the Annuity Fund's trust account balance of \$47,931,470.14 as of June 20, 2001. Also, this page shows that the Annuity Fund earned \$1,323,527.21 which represents earnings made from January 1, 2001 through June 20, 2001.

On June 19, 2001, the Annuity Fund's assets with New York Life were \$47,931,470.14. If the \$374,768 investment earnings for 2000 is added in, the total is \$48,306,238.14. (Exh. 97) Also, the Annuity Fund has additional cash accounts with other financial institutions. As of June 20, 2001, the total participant accounts balance is \$46,607,942.91. Below is a summary:

**Annuity Fund's Total Account Balance with New York Life as compared to Total Participants' Account**

As of June 20, 2001

Account Balance with New York Life	\$ 47,931,470.14
Total Participants Account Balance	\$ 46,607,942.91
Difference - this represents the investment earnings as of June 20, 2001	\$ 1,323,527.21

Table A

As of June 30, 2001, assets held for investment with New York Life were \$52,155,047.26, which included participant loan receivable of \$3,821,498.19. New York Life receives Plan loan repayments from participants which are subtracted from participant loan balances. Also, New York Life receives Plan income (interest payments) on these loans from participants. (Exh. 97B, Also see miscellaneous at the end of this report)

On September 26, 2001, the Fund administrator instructed New York Life to use the unallocated earnings of \$374,768 (which was now \$381,099.30 due to interest earnings while sitting in suspense account), as part of the \$1,555,604.77 employer contribution transmittal dated October 19, 2001. (Exh. 98) Specifically, the Fund administrator withdrew \$1,174,505.47 from the Annuity Fund's Fleet National Bank account, number \_\_\_\_\_, and wired this money to New York Life. (Exh. 99) Account number \_\_\_\_\_ was the Annuity Fund's savings bank account that was designed to transmit employer contribution money.

Then, as per the instructions of the Fund administrator dated September 26, 2001, New York Life transferred \$381,099.30 from the suspense account (SVO frozen account) to the Annuity Fund's Core Trust Account to combine with the \$1,174,505.47, to become the \$1,555,604.77 employer contributions transmittal dated October 19, 2001. (Exh. 100, page 15 & Exh. 101, page 10) A review of a selected number of participant detail fund activity statements show that in October 19, 2001, each participant was properly credited with an Annuity Fund contribution that was received from their respective employer(s). (Exh. 102) Below is a table that illustrates the above:

### Annuity Fund Contribution Remittance

Participants	Date	Amount of Employer Contributions as shown on the remittance report (See Exh. 98)	Amount of Employer Contributions entered into their individual account (See Exh. 102 )
	10/19/2001		
	10/19/2001		
	10/19/2001		

Table B

On September 29, 2006, Annuity Fund Trustees provided the NYRO with an explanation regarding the allocation of \$1,871,978.00, the 2000 plan year investment earnings. The thirteen page letter signed by Annuity Fund counsel Collieran, O'Hara & Mills LLP was not supported by any documentation. (Exh. 103) The letter stated that the 2000 plan year investment earnings were allocated on August 30, 2004. The NYRO requested supporting documentation on November 3, 2006, and as a result, a letter with documentation, signed by Thelen Reid & Priest LLP, counsel to Fund accountant Schultheis & Panettieri, was received. The documentation included information relating to the \$374,768 investment earnings with New York Life from September 1, 2000 through December 31, 2000. (Exh. 104, appendix 2, page 2)

On November 6, 2006, the investigator, via email, inquired from Thelen Reid & Priest LLP, whether the investment earnings were allocated on August 30, 2004. On November 8, 2006, Thelen Reid & Priest LLP responded by stating the following: "The earnings of \$374,768, for the period from September through December 2000, was included in the \$1,871,978 allocable earnings for the year 2000, and accordingly, was part of the interest reallocation that occurred on August 30, 2004." (Exh. 105)

In his March 16, 2007 interview, James Heinzman, managing partner of Schultheis & Panettieri, stated that the \$374,768 investment earnings were part of the employer contribution that was made on October 19, 2001. (Exh. 106) This was because, during that time, some of the employer contribution money that was received was used to pay fund expenses. He further stated that during that period, there was not enough money to cover Annuity Fund expenses. Additionally, he explained that if the \$381,099.30 investment earnings were allocated in 2001, the Annuity Fund's cash balance would not be the same as the total participants' account balance and therefore, the Annuity Fund would be underfunded. (Exh. 106)

In his March 29, 2007 interview, Albert Wassell, the Funds administrator, stated that the Annuity Fund Trustees made the decision not to allocate the \$381,099.30 investment earnings until the Annuity Fund accounts were reconciled, at the advice of Schultheis & Panettieri. He also stated that the earnings were allocated within the settlement of August 30, 2004, when the money received from the settlement was reconciled. (Exh. 107)

The NYRO requested an explanation from the Fund administrator as to why the \$381,099.30 earnings was used as an "offset" to the employer contributions transmitted on October 19, 2001. He stated that the money was used to pay accrued administrative expenses. (Exh. 107) To further explain it, he provided the following statement: "There is a procedure in place, which was started when New York Life became the Annuity Fund custodian and record keeper in 2000, that whenever the Annuity Fund needs money to pay administrative expenses, New York Life issues a check payable to the Annuity Fund and this money is then deposited into an Annuity Fund Fleet Bank checking account. This account is then use to pay administrative expenses." (Exh. 107)

Annuity Fund counsel Denis Engel, from Colleran, O'Hara & Mills LLP, provided a detailed explanation as to the use of the \$381,099.30 investment earnings. He stated that the \$381,099.30 was used as an "offset" of the employer contributions transmitted on October 19, 2001. He explained that by using these earnings, a two-step procedure was avoided, the employer contribution remitted into the Annuity Fund's New York Life account and then the money forwarded into the Annuity Fund checking account for the payment of administrative expenses. (Exh. 108)

On April 5, 2007, James Heinzman provided a written explanation concerning the use of the \$381,099.30 earnings as an "offset" to the employer contribution. (Exh. 109) The explanation showed that the above earnings were sitting in the "frozen" Stable Value Option account and then was transferred to the Fund's Core Fund account as part of the employer contributions that were transmitted on October 19, 2001. In his interview on August 17, 2007, the Fund administrator stated that the \$381,099.30 investment earnings were allocated on October 19, 2001. (Exh. 110) In his September 24, 2007 interview, James Heinzman stated that the \$381,099.30 was allocated on August 30, 2004. (Exh. 111) Below is a summary:

**Transfer of 2001 contributions**

Employer contribution money withdrawn from Fleet Bank Acct. No. wired to New York Life	Money withdrawn from New York Life's Stable Value Account (frozen)	Employer contribution transmitted to New York Life on October 19, 2001
\$1,174,505.00	\$381,099.00	\$1,555,604.00

Table C

In his November 8, 2006 response, James Heinzman stated that the allocation occurred on August 30, 2004. On the contrary, his written statement dated April 5, 2007 indicates that the allocation took place on October 19, 2001. James Heinzman considered the "offset" of the \$381,099.30 earnings against the total employer contributions transmitted as an allocation of the yearly earnings. However, in his interview on September 24, 2007, James Heinzman stated that the allocation of the earnings occurred on August 30, 2004. (Exh. 111)

In his March 29, 2007 interview, Fund administrator Albert Wassell indicated that the 2000 investment earnings were allocated on August 30, 2004. On the contrary, in his interview on August 17, 2007, Albert Wassell stated that the allocation took place on October 19, 2001, since it appears that he considered the "offset" on October 19, 2001, the allocation of the 2000 investment earnings.

According to Albert Wassell in his interview on March 29, 2007, the procedure for the payment of administrative expenses with New York Life was first utilized on September 27, 2001. On this date, Fund custodian New York Life issued check number 342617 for \$250,000, which was payable to the Annuity Fund. (Exh. 112) The record shows that this check was deposited into Fleet Bank account number \_\_\_\_\_ on October 3, 2001. (Exh. 113) Fleet Bank account number \_\_\_\_\_ was a checking account used to receive employer contribution money and money for the payment of Annuity Fund expenses. On the same day, \$250,000 was transferred from Fleet Bank account number \_\_\_\_\_ to Fleet Bank account number \_\_\_\_\_. (Exh. 114) Fleet Bank account number \_\_\_\_\_ was a savings account which was used to transmit employer contribution money. This account did not actually receive the employer contribution money. Employer contribution money would be transferred from account number \_\_\_\_\_ to this account. Review of a select number of Participant Detail Annuity Fund Activity Statements revealed that administrative fees were charged to each participant's account on September 27, 2001. A check for \$250,000 was issued by New York Life to pay administrative fees. (Exh. 115) The investigation shows that since September 2001, this procedure has been utilized by the Annuity Fund to pay administrative expenses. (Exh. 116) This is illustrated below:



Date	Check Number	Amount of check issued to pay for administrative expenses	Amount of share of administrative expenses charged to	Amount of share of administrative expenses charged to	Amount of share of administrative expenses charged to
09/27/2001	342617	\$250,000.00	635.96	265.60	1952.28
06/07/2002	414058	120,000.00	333.58	154.60	945.35
08/26/2002	435375	60,000.00	171.40	83.39	492.51
12/31/2002	489977	175,000.00	475.89	242.55	1377.40
06/02/2003	537114	120,000.00	339.48	170.94	916.94
09/04/2003	567920	60,000.00	176.52	89.12	453.67
04/13/2004	644858	60,000.00	188.20	93.07	458.19
07/13/2004	681208	115,000.00	355.57	181.53	867.63
10/21/2004	723444	66,000.00	205.69	105.85	496.01

**Table D**

Accrued expenses are expenses that the Annuity Fund incurred but has not paid yet. There is no proof that the Annuity Fund paid accrued expenses totaling \$381,099.00 by the end of 2001. Review of the audit work papers, which were certified by Schultheis & Panettieri, showed that the Annuity Fund had accrued expenses totaling \$73,155.00 as of December 31, 2001. However, these expenses were not yet paid by the end of 2001. (Exh. 117) In order for these expenses to be at least considered part of the \$381,000 purported accrued administrative expenses, it had to have been paid by the end of December 31, 2001. The accrued expenses in 2000 were \$110,324.00. By June 27, 2001, \$91,988.75 of these accrued expenses was paid. (Exh. 118) There are no other financial facts in the Annuity Fund's records to indicate that there were additional accrued expenses. As reflected on Table A and supported by Exhibit 97, as of June 20, 2001, the Annuity Fund had investment earnings totaling \$1,323,527.21. With these investment earnings, the payments for the year 2000 accrued expenses totaling \$91,988.75, which were paid by June 27, 2001, would not have resulted in any kind of a cash shortfall.

The NYRO requested copies of invoices and checks to support the claim that there were accrued expenses that were incurred and paid by the end of 2001. Three emails and a subpoena were sent with no response. (Exh. 119) Below is the list:

- ❖ Email dated April 4, 2007
- ❖ Email dated May 22, 2007
- ❖ Subpoena dated June 29, 2007
- ❖ Email dated August 7, 2007

The statement made by Fund administrator Albert Wassell to justify the use of the \$381,099 investment earnings as part ("offset") of the October 19, 2001 employer contribution remittance (in order to avoid the two-step procedure for the payment of administrative expenses), are disproved by the facts presented above. The purported accrued administrative expenses that were supposed to have been paid by December 2001 to justify the "offset" (the use of the investment earnings), does not exist. On September 27, 2001, administrative expenses charged to participants were already paid. (As illustrated by Table D and Exh. 116)

The statements made by Albert Wassell and James Heinzman concerning when the \$381,099.30 investment earnings were allocated indicate two possible dates. The way the allocation was actually performed and the purpose of the allocation was not recorded in the Board of Trustees meeting minutes. This was despite the fact that Albert Wassell indicated that this was done at the advice of independent Fund auditor Schultheis & Panettieri. (Exh. 107)

In his March 16, 2007 interview, James Heinzman indicated that if the \$381,099.30 investment earnings would have been allocated, the Annuity Fund would have been under funded because the Fund asset balance would have been less than the total participants' account balance. Yet, as of September 30, 2001, the Annuity Fund's total asset balance with New York Life was \$49,916,081.77. (Exh. 120) Total participants' account balance, as of December 31, 2000, was \$46,686,166.00. If you add the October 19, 2001 employer contribution of \$1,555,604.77, then the total would be \$48,241,770.77. Table E below illustrates that as of October 19, 2001, the Annuity Fund's asset balance was \$1,674,311.09 over the projected participants' total account balance. Table F shows that the Fund had enough cash to pay for any expenses that needed to be paid by the end of 2001. (Exh. 121)

As of October 19, 2001

Annuity Fund's Asset Balance as of 9/30/2001 with New York Life	\$ 49,916,081.77 (Exh. 120)	
Participants Account Balance as of 12/31/2000		\$46,686,166.00 (Exh. 127)
Plus Employer Contribution transmitted 10/19/2001		\$ 1,555,604.77 (Exh. 98)
Total Projected Participants Account Balance as of 10/19/2001		\$48,241,770.77
This represents the amount of Annuity Fund assets over the total Participants Account Balance as of 10/19/2001	\$ 1,674,311.00	

Table E

Note: The Annuity Fund has other cash accounts beside New York Benefit Life as listed below in Table F.

**Annuity Fund's Cash Accounts  
For the month of October 2001**

Financial Institution	Cash value of the accounts
Fleet Bank Account No. _____ as of 10/16/2001	\$541,122.81
Fleet Bank Account No. _____ as of 10/3/2001 (See Note 1 & Note 2)	\$1,358,307.99
CitiBank balance per statement from 9/27/2001 to 10/24/2001	\$ 57,332.78
Bank of New York Cash Reserve Fund – interest bearing cash account with a market value as of 12/31/2001 (See Note 3)	\$1,401,997.00
Total Cash Accounts (See Note 4)	\$3,358,760.58

Table F

Note # 1 - On 10/3/2001, \$250,000 was deposited into this account. The source of this money, was the check issued by New York Life payable to the Annuity Fund to pay for administrative expenses.

Note # 2 - On 10/19/2001, \$1,174,505.47 was withdrawn from the \$1,358,307.99 and transmitted as part of the employer contribution totaling \$1,555,604.77.

Note # 3 - The \$1,401,997.00 represent the total balance as of 12/31/2001. Actual balance as of 10/19/2001 is not available; however, it should be close to this amount.

Note # 4 - All the cash accounts above are available to the Annuity Fund on demand as reflected in the exhibits.

(Exh. 121) Copies of statements from banks.

The explanations presented by Albert Wassell and James Heinzman to justify the use of the investment earnings as an "offset" to the employer contribution transmittal dated October 19, 2001, are neither supported by the financial data reflected in the Fund's records nor identifiable by any transaction or document. Thus, the investment earnings were used as part of the \$1,555,604.00 employer contribution transmittal dated October 19, 2001. As illustrated by **Table C and Exhibits 98, 99, 100, 101 and 102**, the \$381,099.30 investment earnings of the Annuity Fund, for the period from September 1, 2000 through December 31, 2000, was added to the \$1,174,505.00 employer contribution money to transmit \$1,555,604.00 employer contributions to New York Life. During this time period, the Annuity Fund received a total of \$1,500,757.70 in employer contributions from contributing employers as detailed by **Table G** below. (Exh. 159) James Heinzman stated in his September 24, 2007 interview that he was aware of the use of the \$381,099.30 investment earnings as an "offset" to the employer contribution that was made and determined that this was not a prohibited transaction. (Exh. 111)

The table below shows that the Annuity Fund's Fleet National Bank account number 1413, received the following employer contribution deposits from January 18, 2001 through July 19, 2001: (Exh. 159)

01/18/2001	\$ 154,166.56
01/30/2001	95,666.29
02/05/2001	58,788.49
02/08/2001	3,570.00
02/02/2001	137,891.16
03/07/2001	83,531.20
03/13/2001	203.75
03/23/2001	137,878.96
04/04/2001	3,050.40
04/04/2001	96,450.96
04/11/2001	61,771.32
04/23/2001	79,283.30
05/02/2001	61,226.10
05/09/2001	57,560.74
05/24/2001	116,803.02
06/07/2001	2,046.06
06/08/2001	126,996.92
Total as of 6/8/01	<b>\$1,276,885.23</b>
06/27/2001	82,187.82
07/02/2001	50,929.20
07/12/2001	21,653.31
07/17/2001	58,420.04
07/19/2001	10,682.10
Total Deposits	\$1,500,757.70

Received	
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Table G

Below is a summary of the investment earnings and lost earnings due participants as of August 3, 2001:

Investment Earnings as of October 19, 2001	\$381,099.30
Lost Earnings Due from October 20, 2001 up to September 30, 2007	<u>\$381,002.24</u>
Total Amount Due	\$762,101.54

2. The Annuity Fund Trustees failed to allocate the year 2000 investment earnings to participants in violation of ERISA Sections 404(a)(1)(A)(ii), (B) and (D), 406(a)(1)(D) and 406(b)(1) and (2).

The investigation revealed that the Annuity Fund Trustees did not allocate the year 2000 Annuity Fund investment earnings. According to the audited financial statements dated August 2, 2001, no earnings were allocated for the year ended December 31, 2000 and the "Net Assets available for Benefits" were \$49,497,552.00. (Exh. 122, page 11) The Plan document requires that the allocation of investment earnings or loss for the year be determined on the valuation date, which is normally the date the financial audit is completed. (Exh. 90)

According to the financial statements as of December 31, 2000, the investment earnings were \$2,058,657.00 as summarized below:

Total Investment Income	\$2,576,493
Less: Investment Expenses	(\$ 181,325)
Administrative Expenses	<u>(\$ 336,511)</u>
Investment Earnings for 2000	\$2,058,657 (Exh. 122, page 3)

Note: The Annuity Fund Interest Allocation Analysis special project completed on September 28, 2001 showed that for the year 2000, the investment earnings were \$1,871,978. (Exh. 129) This was accomplished by not including the interest earned by the Fund from participant loans totaling \$186,679 as investment income. According to the special project, total investment income was, \$2,389,814 minus expenses of \$517,836, equaling \$1,871,978. If the interest earned from participant loans was added, total investment income of \$2,576,493 would agree with the audited financial statements as of December 31, 2000. (Exh. 122)]

During the course of the investigation it was disclosed that in year 2000, the Trustees decided that the Annuity Fund should become self-directed. During this time, the Annuity Fund was administered by the Annuity Fund Trustees through Reynolds Securities. To convert the Annuity Fund to a self-directed plan, the assets were transferred from the Bank of New York to a new financial custodian, New York Life, effective September 1, 2000. However, prior to the transfer, the former Fund administrator Jerome Market moved \$5,499,998.98 from the Bank of New York to Fleet National Bank, Account No. [redacted]. Specifically, from January 2000 until August 2000, at the instruction of Jerome Market and Thomas Reynolds of Reynolds Securities to the Bank of New York, a series of wire transfer transactions occurred from the Bank of New York to Fleet National Bank. Table H below and Exhibit 123, details all the wire transactions that took place before September 1, 2000:

Date	Wire No.	Amount
01/07/2000	5068	500,000.00
01/07/2000	4733	500,000.00
01/14/2000	2636	500,000.00
01/14/2000	3851	500,000.00
03/21/2000	3849	250,000.00
03/21/2000	3819	250,000.00

03/21/2000	3869	250,000.00
03/21/2000	3677	250,000.00
06/09/2000	2256	250,000.00
06/09/2000	2162	250,000.00
06/09/2000	2163	250,000.00
06/09/2000	2263	250,000.00
08/16/2000	4532	333,333.00
08/18/2000	4723	166,666.00
08/16/2000	4491	333,333.00
08/18/2000	4832	166,666.00
08/16/2000	4569	333,333.00
08/18/2000	4844	166,666.00
Total		<u>\$5,499,997.00</u>

Table H

The investigation revealed that the June 15, 2000 Board of Trustees meeting minutes included a discussion regarding the differences in the Annuity Fund's investment returns as reported by the Fund accountant and Fund investment advisor. The minutes indicated that the Trustees discussed proposals that had been received from two auditing firms who were hired to identify the reason for the discrepancy. However, review of the minutes does not indicate where the information on the discrepancy was obtained and who discovered the discrepancy. (Exh. 124) Minutes of the Board of Trustees meeting dated October 18, 2000 showed that the auditing firm Marcum & Kleigman was hired to review the reported discrepancy. The minutes also noted that Robert Weinstein, the Funds' auditor, was not present. In December 2000, Fund administrator Jerome Market retired and was replaced by Albert Wassell.

On June 15, 2001, Fund administrator Albert Wassell issued letters to all participants informing them of their balance in the Annuity Fund as of December 31, 2000. The letter stated that their account balance does not include the interest earned for the year 2000. Attached to the letter was a statement showing the total employer contributions the participant received for the year 2000. (Exh. 125)

The minutes of the Annuity Fund's Board of Trustees meeting dated June 21, 2001 disclosed that the services of Fund accountant Marcum & Kleigman were terminated. This was because Marcum & Kleigman did not perform all the services that they were supposed to and the work that they did perform was incomplete or unsatisfactory. The minutes also indicated that Schultheis & Panettieri was hired as the new Fund accountant. Schultheis & Panettieri was already engaged by all of the Local 12 funds as payroll auditor. The minutes also revealed that Vincent Panettieri, of Schultheis & Panettieri, reported that he had given New York Life, for the purpose of going live with self-directed accounts, the Annuity Fund individual account balances as of December 31, 2000. During this meeting, both James Heinzman and Vincent Panettieri were present. This was the first meeting that had occurred since Schultheis & Panettieri became the Fund accountant. (Exh. 126) Review of the data shows that New York Life received the individual account December 31, 2000 balances on June 6, 2001. The data also showed that the total participants' account balance was \$46,629,504.07. A \$56,662.00 adjustment was later included to make the total \$46,686,166.00. (Exh. 127)

The investigation revealed that the financial audit for the Annuity Fund for plan year 2000, which was performed by Schultheis & Panettieri, was completed on August 2, 2001. There were no amended financial statements or Form 5500 prepared after the date of the report. Review of the notes to the financial statements disclosed that the earnings for the year ended December 31, 2000 were not allocated. (See financial statements, page 11, note 8) The Annuity Fund's Net Assets Available for Benefits, as of December 31, 2000, was \$49,497,552.00, which includes \$2,756,494 of loan receivables. (Exh. 122) The audit work papers of Schultheis & Panettieri, initialed by a number of auditors including James Heinzman, certified that as of December 31, 2000, both the total participant account balances and the Annuity Fund asset balance (in the Core Fund) was \$47,060,934.17. (Exh. 128) The audit work papers show that \$2,561,898.34, which represents the employer contributions for 2000, was wired to New York Life. The bank records show that this money was wired on June 19, 2001 from Fleet National Bank Account No. 3. Also, as of December 31, 2000, the Annuity

Fund had a total cash balance of \$1,495,131.00 amongst three accounts and loan receivables of \$2,756,494.00 (the financial statement amount) or \$3,807,621.70 (the New York Life Amount). **Tables L and N** below will provide a more detailed explanation.

The investigation revealed that during the audits, the Net Assets Available for Benefits, as of December 31, 1999, was \$51,304,495.00. (Exh. 122, also see note below) Consequently, if there was a shortfall, where total plan assets were \$1.9 million less than the total of the participants' account balances (claimed as the result of the Annuity Fund theft), it was not reported for the period ending December 31, 1999. The audit shows that by the end of December 31, 2000, Net Assets Available for Benefits were \$49,497,552.00 and total participant account balances were \$46,696,166.00. The total participants' account balance of \$46,696,166.00 is below the December 31, 1999 net asset amount of \$51,304,495.00 and the December 31, 2000 net asset amount of \$49,497,552.00. As illustrated on **Table O** below, the subsequent financial audits performed from 2001 to 2005, did not claim that there was a shortfall of \$1.9 million and this information was never incorporated into any of these audits.

[Note: Exhibit 149 and the Form 5500 and financial statements for 1999 indicate that Net Assets were \$50,775,924.00. However, the Net Asset amount was changed to \$51,304,495.00, due to the conversion from the cash basis of accounting to the accrual basis of accounting. Net Assets increased by \$528,571.00. Schultheis & Panettieri auditors made this change in accounting method. (Exh. 122)]

In note 12 on page 12 of the audit report completed August 2, 2001, it states the following, "**The Trustees are currently investigating several transactions that occurred between 1996 and 1999 whose authenticity and appropriateness are uncertain. Some of these transactions may have been fraudulent. As the investigation is not complete and the outcome is uncertain, no provision has been made to the financial statements as of December 31, 2000 and 1999 relating to such contingencies. Accordingly, no disclosure had been made on the Annuity Fund's Form 5500 for the year ended December 31, 2000.**" (Exh. 122)

The investigation revealed that a special project called the "Annuity Fund Interest Allocation Analysis" was performed by Schultheis and Panettieri to determine any discrepancies. It was completed on September 28, 2001 and showed that from 1990 through 1999, investment earnings were misallocated by former Fund administrator Jerome Market. Review of the special project report indicated that it did not contain any documentation proving the misallocations. (Exh. 129) The investigation revealed that after this special project was completed, a Board of Trustees meeting was held on October 19, 2001. Review of the meeting minutes showed that there were no discussions regarding the results of the special project or the Annuity Fund shortfall. (Exh. 130) On March 26, 2006, the NYRO requested James Heinzman to provide the source documents that showed the misallocation of the investment earnings. (Exh. 188) However, James Heinzman did not provide this information.

On January 29, 2002, Fund administrator Albert Wassell mailed letters to participants informing them of the results of the agreed upon procedures performed by Schultheis & Panettieri auditors. This letter did state that there were discrepancies discovered, however, there was no mention of a shortfall. (Exh. 131)

On April 29, 2002, Annuity Fund participant \_\_\_\_\_ mailed a letter to the Annuity Fund Trustees requesting information regarding the 2000 Annuity Fund investment earnings. (Exh. 132) On August 7, 2002, the Annuity Fund Trustees replied by stating the following, "The Trustees are in the process of reviewing the participants' account balances, on an overall basis, to determine the proper interest/investment allocation. Once this review is completed, each participant will be informed." (Exh. 133) This letter to participant \_\_\_\_\_ shows that the purported shortfall discovered in September 2001, as the result of the "Annuity Fund Interest Allocation Analysis" special project, was not disclosed to him.

The investigation revealed that the Annuity Fund Trustees did not inform the participants of this purported shortfall. The NYRO interviewed three participants and they all stated that the shortfall was only rumors. (Exh. 134)

In a letter from Fund administrator Albert Wassell dated April 6, 2004, the participants were informed that on April 26,

2004, a general meeting was to be held to explain the allocation of the settlement payments and investment earnings for 2000. The letter also stated that the participants will be offered an opportunity to review their individualized Annuity Fund statement upon receipt and a meeting could be scheduled with the Fund administrator to discuss the statement. (Exh. 135) During that meeting, the special project, "Litigation and Re-Allocation Analysis", was presented to participants. (Exh. 136) James Heinzman, of Schultheis & Panettieri, attended the meeting and gave a presentation to the membership about this project. Then he offered to meet with participants to discuss their statements. The individualized Annuity Fund statements were created by Schultheis & Panettieri auditors when they conducted the special project mentioned above. (Exh. 137)

Annuity Fund participant \_\_\_\_\_ met with James Heinzman at the Fund office. Despite all the activities related to this special project, James Heinzman did not disclose this to NYRO investigators in his interview dated November 10, 2004. (Exh. 138) During the review of the Annuity Fund invoices regarding the payments for the special project, the NYRO did not find any work product (hard copy document) corresponding to these paid invoices. The NYRO Voluntary Compliance Letter dated May 3, 2005, disallowed these payments. (Exh. 141, Issue 7) In their response to the Voluntary Compliance Letter dated October 21, 2005, Schultheis & Panettieri disclosed that this special project was in fact performed and provided supporting documentation regarding the project. (Exh. 136)

After the litigation was settled, the individualized Annuity Fund statements of the participants were not generated by record keeper New York Life, but rather by Schultheis & Panettieri and were mailed to participants by the Annuity Fund office. Review of these statements showed that, with the exception of the bottom line amount that was allocated to the participant's (the addition/<deduction>) individual account balance, all the financial data reflected in these statements was not incorporated into the participants' account database with New York Life. In other words, these purported Annuity Fund statements were created outside of the participants' account statements database and has no effect or bearing on the participants' accounts. The bottom line amount for each participant on the Annuity Fund statement is identical to the amount each participant later received when the fidelity bond, fiduciary bond and defendant settlement monies were received and allocated on August 30, 2004.

On August 17, 2004, Fund administrator Albert Wassell informed the participants that the distribution of monies recovered and the account rebalancing will take place on or before August 30, 2004. The letter added that this will be reflected on their account statement after September 1, 2004. The letter never mentioned that there was a shortfall. (Exh. 139) On August 30, 2004, the Fund administrator allocated the settlement payments totaling \$1,314,688.87 to participants. (Exh. 140) Review of a number of participant accounts show that on August 30, 2004, each participant received an allocation amount that was identical to the bottom line amount shown on the special project Annuity Fund statement that was created by Schultheis & Panettieri. (Exhs. 102 & 115) (Also, See Voluntary Compliance Letter Dated May 3, 2005 - Exh. 141)

The Litigation and Re-Allocation Analysis special project (Litigation Special Project) purportedly resolved the discrepancy identified in the Annuity Fund Interest Allocation Analysis special project, that is, to show that as of December 31, 2000, there was not enough Annuity Fund Net Assets to allocate the investment earnings for plan year 2000. Review of this project shows that it was designed to allocate the share of each participant's settlement monies received from the fidelity bond, fiduciary bond and individual settlements. This was the result of the civil case against the fraudulent acts that were performed by the former Fund administrator and Fund accountant. The Litigation Special Project also supposedly allocated the investment earnings for plan year 2000. However, since this project was purposely designed to carryout the purpose of the Annuity Fund Interest Allocation Analysis, the shortfall was deducted from the participants' investment earnings for plan year 2000. The calculation was the 2000 investment earnings minus the shortfall due to the purported misallocation equals the net addition /deduction to participants' accounts. The total of all the net additions to the participant accounts was identical to the total settlement monies received and allocated to participants on August 30, 2004.

Tables I and J, below, show how the Litigation and Re-Allocation Analysis reduced the investment earnings for 2000 for Annuity Fund participant \_\_\_\_\_ from \$18,292.05 to \$1,372.59 because his account had been overstated by \$16,909.46 from 1993 through 1999. The same procedure was applied to all participants. The \$18,292.05 investment earnings of Henry Schroeder were his proportional share of the 2000 Annuity Fund's investment earnings.

Fund Participant	
	Earnings/Loss
Beginning of 1993	\$ 4,452.16
1993	354.25
1994	(12,564.27)
1995	10,144.06
1996	(25,825.98)
1997	2,259.54
1998	(4,413.85)
1999	8,674.63
Purported net loss after combining misallocations that took place from 1993 - 1999	\$ (16,909.46)

Table I

Fund Participant	
Investment earnings as of 2000	\$ 18,282.05
Minus - misallocation (Loss) from 1993 to 1999	(16,909.46)
Net investment earnings after deduction of misallocation 1993-1999	1,372.59
Fidelity/Theft proceeds	2,819.07
Allocation of refunded administrative fees	1,681.82
Net addition(deduction) to individual's account balance	\$5,873.48

Table J

Table K below shows the "Allocable Income" from 1990 through 2000. The net result reduced the Net Assets Available for Benefits amount, which was only reflected in the special project, to justify the non-allocation of plan year 2000 investment earnings. The data on this table is undocumented and is not reflected on the audited financial statements or in the Annuity Fund's assets amount with New York Life. In other words, this data is solely outside of the Annuity Fund's overall financial information base. The bottom amount on this table was never compared to the total Annuity Fund net asset amount with New York Life nor with the Annuity Fund financial statements.

Year	Over/Under Allocation of Allocable Yearly Income
1990	(315,000)
1991	96,000
1992	(204,000)
1993	74,000
1994	(2,345,000)
1995	1,720,000
1996	(3,916,000)



1997	328,000
1998	(601,000)
1999	1,166,000
Over Allocation	(3,997,000)
2000 Investment Earnings	1,872,000
Shortfall = The actual amount of the shortfall claimed was \$1,900,309.00 as per September 29, 2006 response (Exh. 103)	(2,125,000)

**Table K**

New York Life is the record keeper of the Annuity Fund besides being the custodian. The financial data shown on **Tables I and J** above was never entered into the data base of the custodian. As illustrated on the participant's daily activity statement, the August 30, 2004 settlement allocation amount is identical to the "Net Addition (Deduction) to Individual's Account Balance" shown on **Table J**. (Exhs. 102 & 115) The financial data reflected on the above tables were never incorporated into the participant's data base with the custodian.

On November 7, 2005, the NYRO received a letter from Annuity Fund participant [redacted] complaining that he did not receive the correct amount of his investment earnings for 2000 and his share of the settlement monies on August 30, 2004. (Exh. 96) On April 28, 2006, [redacted] was interviewed at the NYRO in which he reiterated his complaint. (Exh. 142)

Review of this special project that Schultheis and Panettieri performed revealed that the \$1,871,978 investment earnings for plan year 2000 was combined with the purported shortfall that occurred from 1990 through 1999. According to the Annuity Fund Trustees' response dated September 29, 2006, the end result was there was not enough money to allocate the investment earnings. (Exh. 103) Review of the individual participant account statements created by Schultheis and Panettieri auditors revealed that whatever investment earnings the participants' earned in 2000, were reduced by the shortfall of 1990 through 1999. According to James Heinzman of Schultheis and Panettieri, since the shortfall was incorporated into this special project, the allocation of the settlement money would equal the allocation of the investment earnings for plan year 2000. James Heinzman indicated to the NYRO that there was a shortfall. (Exh. 103B)

According to the response by Fund counsel, Collieran, O'Hara & Mills, dated September 29, 2006, they claimed that there was a shortfall in Annuity Fund assets totaling approximately \$1,900,309. (Exh. 103) Fund counsel claimed that the total amount of Annuity Fund assets on hand as of December 31, 1999, was materially less than the total amounts reflected by adding up all of the individual accounts for that year. The undocumented response also claimed that the \$1,871,978 investment earnings of the Annuity Fund for 2000, was needed to fully fund the shortfall and enabled the Annuity Fund Trustees to move forward with the transition to the participant directed account platform with New York Life while avoiding any reduction in the individual accounts.

Below is a summary comparing Annuity Fund's assets, including participant loan receivables, to the total participants' account balances as of December 31, 2000. The summary below is presented to show two calculations both of which indicate that the amount of assets greatly exceeds the total participants' account balances as of December 31, 2000:

	Loan Receivable Amount according to Schultheis & Panettieri audited financial statement as of 12/31/2000 (Note 1)	Loan Receivable Amount according to New York Life's Annual Trust Reporting Package as of 12/31/2000 and the audit work papers certified by Schultheis & Panettieri auditors. (Note 2)
Participants Loan Receivables (Note 1 & Note 2)	\$ 2,756,494.00	\$ 3,807,621.70
Total Annuity Fund's Net Assets Available For Benefits based on the audited financial statements as of 12/31/2000	\$49,497,552.00 (includes above receivable)	\$50,548,680.00 (includes above receivable)
<b>Minus</b> - Total Participants' Account Balances as of 12/31/2000 (Note 3)	\$46,686,166.00	\$46,686,166.00
Amount of assets in excess over the total participants' account balances as of 12/31/2000	\$ 2,811,386.00	\$ 3,862,514.00

**Table L**

Note 1: Audited financial statements show that the total participants' loan receivable differs from that of the trust statement of New York Life. The audit work papers, although, annotated by Schultheis and Panettieri auditors, do not show any adjusting entries made to make the totals between the audited financial statements and the trust statement of New York Life reconcile. (Exhs. 143 & 144) In other words, the audit work paper, that has the initial of James Heinzman, shows that the loan receivable was \$3,807,621.70. However, without any explanation, James Heinzman entered \$2,756,494.00 as the loan receivable in the financial statements.

Note 2: On April 19, 2007 and May 22, 2007, the NYRO sent emails to the Annuity Fund Trustees requesting an explanation as to the discrepancies between the yearly loan receivable amounts. As of this date, the Annuity Fund Trustees have not provided a written response. (Exh. 145)

Note 3: Participants' total account balances that were provided to New York Life by Schultheis & Panettieri auditors on behalf of the Annuity Fund Trustees and do not include any of the 2000 investment earnings. (Exhs. 124 & 127)

The summary above shows that as of December 31, 2000, if loan receivables are included, Annuity Fund net assets exceed the total participants' account balances. The total Annuity Fund net assets as of December 31, 2000, involving the above two situations, are the cumulative or aggregate amounts of all the yearly total asset amounts of the preceding years. In other words, the total net assets of \$49,497,552.00 in 2000, was the cumulative total of all total assets from December 31, 1990 through December 31, 2000.

Based on the civil complaint filed against the former Fund administrator and Fund accountant, the Annuity Fund lost money due to fraud from 1997 through 1999. The complaint alleges that misallocations of the investment earnings occurred from 1993 through 1999. The yearly investment earnings for these years were allegedly computed incorrectly resulting in the misallocations of earnings. As the result of these misallocations, there was a shortfall on the overall assets of the Annuity Fund from 1993 through 1999, totaling approximately \$1.9 million. (Exh. 103, page 6) However, in plan year 2000, total Annuity Fund net assets, as of December 31, 2000, were at least \$49,497,552.00 if loan

receivables are included. To arrive at this amount, the money lost due to fraud by the former Fund administrator and Fund accountant and the purported shortfalls that occurred from 1993 through 1999, were already taken into account in this amount. To prove this point, during the audit of the Annuity Fund for plan year 2000, which was completed by August 2, 2001, there was no shortfall reported, although note 12 to the financial statements does indicate that the Fund's auditors were still conducting an investigation. (See page 10, above and Exh. 122, note 12, on page 10). The audit report, financial statements and the audit work papers, all certified by Schultheis & Panettieri auditors, did not show any information to indicate that there was a shortfall. (Exh. 146) The Board of Trustees meeting minutes, that took place immediately after the completion of the financial audit on August 2, 2001, do not include any discussion of any kind regarding a shortfall of Annuity Fund assets compared to total participants' account balances. (Exh. 130)

The amount, \$49,497,552.00, represents the Annuity Fund's Net Assets Available for Benefits as of December 31, 2000. Total participants' account balances as of December 31, 2000 were \$46,686,166.00. (Exh. 127) This figure does not include the earnings for year 2000. These figures suggest that there was no shortfall on December 31, 2000 and as a result, the allocation of the investment earnings for 2000 could have been done shortly after the completion of the financial audit on August 2, 2001.

However, the special project "Annuity Fund Interest Allocation Analysis" focuses on Net Assets Available for Distribution, as opposed to Net Assets Available for Benefits, and shows that as of December 31, 2000, the Annuity Fund's Net Assets Available for Distribution were only \$54,892 greater than total participants' account balances. (Exh. 129, page 2, last paragraph) The project's "Analysis of Participant Accounts to Net Assets" presentation shows that as of December 31, 1999, the Annuity Fund's net assets contain a shortfall of \$1,900,309.00. (Exh. 129, page 6) Also, page 6 shows that the \$1,900,309.00 shortfall is then deducted from the combined \$1,871,978 investment earnings of the Annuity Fund for 2000 and the "Other Adjustments" account amount of \$83,223.00, to get the result of \$54,892.00. As the result of this process, the Annuity Fund's net assets, as of December 31, 2000, were only \$54,892 greater than total participants' account balances according to the special project. The discrepancy between the Net Assets Available for Benefits and Net Assets Available for Distribution is the \$2,756,494 in loans receivables which are a Plan asset, but not yet in the Plan's possession.

During his phone interview on September 24, 2007, James Heinzman was asked by the NYRO whether the Annuity Fund's net assets were materially less than participants' account balances ending December 31, 2000. James Heinzman stated the following: "Page 11, footnote 9, in the notes to the Annuity Fund's financial statements for year ending December 31, 2000 will answer that question." Also, he stated that Schultheis & Panettieri's response dated October 21, 2005 indicated that the special project dated September 28, 2001 called "Annuity Fund Interest Allocation Analysis 1990 through 2000", showed that the net assets were only \$54,892.00 greater than the participants accounts. (Exh. 111)

Review of this special project shows that the purported amount of the Annuity Fund's Net Assets Available for Benefits was \$46,741,058.00, which is only \$54,892.00 greater than the participants' account balance. (Exh. 129, page 6) Below, is a summary to illustrate how this special project created an artificial financial condition that resulted in the justification of not allocating the Annuity Fund's investment earnings for 2000:

- Financial audit of the Annuity Fund's plan year 2000 financial statements completed August 2, 2001.
- Plan/Trust documents state that an allocation must be done after a valuation, which is normally done after the completion of financial audits. Financial statements and audit work papers disclosed no Annuity Fund shortfall.
- Trustees decided not to allocate the investment earnings.
- The special project "Annuity Fund Interest Allocation Analysis", which was completed September 28, 2001, discovered a purported shortfall of \$1,900,309.

Below, is a table comparing the Annuity Fund's net assets, as reflected in the audited financial statements performed by Schultheis & Panettieri auditors, and the "special project" that followed, which resulted in the discovery of the

purported shortfall and justification for the non-allocation of the 2000 investment earnings:

	As the result of the financial audits:	According to the special project:
Net Assets Available For Distribution as of December 31, 2000	\$49,497,552.00	\$46,741,058.00 (Exh. 129, pg. 6)
Minus - Total Participant's Account Balance as of December 31, 2000	\$46,686,166.00	\$46,686,166.00
Difference	\$ 2,811,386.00	\$ 54,892.00

Table M

The purported \$46,741,058.00 Net Assets Available for Distribution was not supported by any financial documentation like bank statements, statements from the financial custodian, etc. Review of all the financial documentation used to support the unqualified opinion of the auditors on whether the financial statements present fairly in all material respects the net assets available for benefits, shows that the amount in question was \$49,497,552.00, which amount includes loan receivables. (Exh. 122) The special project's conclusion is that the Annuity Fund's Net Assets Available for Distribution, as of December 31, 2000, was \$46,741,058.00, does not have financial data to support the claim and is the basis for the Trustees' contention that there were not enough net assets to allocate the 2000 investment earnings.

Below, is a table comparing the Annuity Fund's actual assets as reflected by statements from the financial custodian and financial institutions that hold the plan assets, minus liabilities and the "assumed" amount as of December 31, 2000. (Exh. 147)

	Actual plan assets as of 12/31/2000, based on financial statements from custodian and account holders.	Net Assets according to the special project dated September 28, 2001.
Fleet National Bank account No. (Note 1)	\$ 1,112,175.00	
Fleet National Bank account No.	315,899.00	
Citibank	67,057.00	
New York Life - trust account (Note 2)	48,287,657.53 (includes loan receivables)	
Total assets	\$49,782,788.70	
Minus - liabilities as shown on the audited financial statements	210,544.00	
Net Assets as of 12/31/2000 (Note 3)	\$49,572,244.70	\$46,741,058.00
Minus - Total Participants' Account Balance	46,686,166.00	46,686,166.00
Equals - Amount in Excess of Total Participants Accounts	\$ 2,886,078.70	\$ 54,892.00

Table N

Note 1: As illustrated above, \$5,499,997.00 of plan assets from the Bank of New York was transferred to this account between August 2000 and January 2001 from the former Fund custodian. (Table H & Exh. 123)

Note 2: Plan assets held for investment, which includes \$3,807,621.70 in loan receivables, with New York Life were \$48,287,657.53, which exceeds the \$46,686,166.00 total participants' accounts by \$1,601,492.53.

Note 3: As stated on page 2 of the special project dated September 28, 2001, Net Assets Available for Distribution, as of December 31, 2000, was \$54,892.00 greater than total participant accounts, resulting in (total participant accounts of \$46,686,166 plus \$54,892.00 equaling \$46,741,058.00).

The table above, supported by the financial statements from the Fund custodian and other account holders, shows that by the end of December 31, 2000, actual Fund assets (including receivables), was not the \$54,892.00 cited in the "special project". Fund assets by themselves with New York Life were \$1,601,492.53 over total participants' account balances. The claim that as of December 31, 2000, Net Assets Available for Distribution was only \$54,892 greater than account balances, cannot be supported by documents (i.e. financial statements from banks and financial custodian). There is no data in the financial statements that relates to this amount. The NYRO sent three emails to the Fund administrator (April 4, 2007, April 19, 2007 & May 22, 2007), requesting the Fund administrator to provide the NYRO with the breakdown of the Fund's assets as of December 31, 2000. (Exh. 148) No response was provided.

The purported misallocations of yearly earnings from 1990 through 1999 are not supported by documents to prove that the misallocations had occurred (page 4 and 5). Further, the investigation disclosed that the purported Net Assets Available for Benefits as of December 31, 2000, (\$54,892.00 plus \$46,686,166.00 equaling \$46,741,058.00, the total participants' account balance), was never used in the preparation of the financial statements starting in 2001 and beyond. This assumed Net Assets Available for Benefits amount was purposely used solely to project an artificial shortfall of \$1,900,309.00 for plan year ending December 31, 2000. As reflected in the financial statements as of December 31, 2001, this amount was not used and the artificial shortfall was never part of the financial preparation process. When the settlement was received in 2004, it was added to Total Assets of the Fund, thereby increasing the Net Assets Available for Benefits (highlighted in Exh. 149, note 4, below). No reconciliation occurred in 2004 between participants' accounts and the Net Assets Available for Benefits. The reconciliation took place earlier at the completion of the financial audit in August 2, 2001. (Exh. 122, page 11, note 9) Also, participants' accounts were reconciled to net assets available for benefits as of December 31, 2001 shown on audit report dated March 12, 2002. (Exh. 158, page 12, note 6)

Review of the audit work papers and financial statements prepared during the audits show that the auditors appeared to have performed audit procedures similar to AICPA Audit and Accounting Guide for Employee Benefit Plans. (Exh. 146B) This included the audit procedure to conclude whether the total amount in participant accounts reconcile with the total Net Assets Available for Benefits. (Exh. 122 and 158) However, the 2000 financial statements stated that, "No earnings were allocated for the year ended December 31, 2000." (Exh. 122, note 8)

Below is a summary:

\$46,686,166.00 - Total participants account balance as of 12/31/2000 (not including allocation of 2000 earnings)  
54,892.00 - Purported amount over the participants account balance as of 12/31/2000  
\$46,741,058.00 - Purported Net Assets as of December 31, 2000.

Plan Year	Net Assets Available For Benefits as of January 1 of the year in question	Net Assets Available For Benefits as of the end of December 31 of the year in
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		question
1999		\$51,304,495.00 - This amount represents a reclassified amount used by Schultheis & Panettieri auditors. The 1999 amount used by the former auditor was \$51,269,070. The difference between the two amounts is \$35,425.00, which is immaterial
2000	\$51,304,495.00	\$49,497,552.00
2001	\$49,497,552.00 (Note 1)	\$51,411,765.00
2002	\$51,411,765.00	\$54,173,400.00 (Note 2)
2003	\$54,173,400.00	\$59,258,367.00 (Note 3)
2004	\$59,258,367.00	\$65,432,976.00 (Note 4)
2005	\$65,432,976.00	\$68,118,490.00

Table O

(See Exhs. 76, 149 & 189, prepared Form 5500's and financial statements from 1999 through 2005)

- Note 1: The \$49,497,552.00 Net Asset amount as of January 1, 2001, would not have been used in the preparation of the financial statements ending on December 31, 2001, if the purported shortfall was valid.
- Note 2: As reflected in the notes to the financial statements for 2002, page 14, the settlement of \$375,456.00 received was added as "Other income" (page 3, highlighted) thereby increasing the Fund's total assets.
- Note 3: \$51,521.00 was received and added as "Other Income" in 2003, thereby increasing the Fund's total assets.
- Note 4: As reflected in the notes to the financial statements for 2004, page 14, note #11, the settlement of \$901,000.00 that was received was added as "Other Income" (page 3, highlighted) thereby increasing the Fund's total assets.

The investigation revealed that during the financial audit of plan year 2000, Schultheis & Panettieri auditors used the "Schultheis & Panettieri Employee Benefit Plan Audit Planning Checklist". (Exh. 150) A section of this audit plan has a checklist which includes the following question, "If the plan is a defined contribution plan, is there an unreconciled difference between net assets available for benefits per the trustee or custodian records and the plan's records?" The auditor in charge checked "NO" in response to this question. The audit plan's checklist responses, which were recorded by Schultheis & Panettieri auditors, show that there was no information to indicate that there was a shortfall. At the conclusion of the audit, a planning materiality/analytical review was performed. According to this analysis, Fund assets were \$49,708,096.00. Based on this analysis performed by Schultheis & Panettieri auditors, the Fund assets exceeded the participants' account balances by \$3,021,930.00 (\$49,708,096.00 minus \$46,686,166.00). Also, the materiality checklist used \$51,348,000.00 as the total Fund assets at the end of 1999, which is almost the same as the actual amount of \$51,304,495.00, which was used in the preparation of the financial statements. Either way, the 1999 figures are still over the total participants' account balance of \$46,686,166.00 by the end of 2000. It appears that this analysis was performed and initialed by James Heinzman dated September 2001. Also, the whole audit plan was prepared by him as manager.

The investigation revealed that after the completion of the financial audit for plan year 2000 on August 2, 2001, the Annuity Fund's actual financial condition as of August 31, 2001, was as follows: (Exh. 151)

Assets Held For Investment With New York Life	\$50,796,354.65
Fleet National Bank Account No. 9	381,536.67
Fleet National Bank Account No. 2	724,951.81

Total	51,902,843.13
Minus - Total Participants' Account Balances as of December 31, 2000	(46,686,166.00)
Difference	5,216,677.13
Total Liabilities for 2001 as per financial statements (Exh. 158)	(100,752.00)
Difference Between Total Assets And Total Participants' Account Balances, as of August 31, 2001, minus liabilities for the whole year 2001	\$5,115,925.13

Table P

The special project "Annuity Fund Interest Allocation Analysis" was completed on September 28, 2001. It showed that as of December 31, 2000, the Annuity Fund's Net Assets Available for Distribution were \$46,741,058.00 (\$46,686,166.00 plus \$54,892.00). Below is a table showing the Annuity Fund's actual financial condition as of September 30, 2001, immediately after the completion of the special project: (Exh. 152)

As of September 30, 2001	
Assets Held for Investment with New York Benefit Life (Exh. 152)	\$49,916,081.77
Fleet National Bank Account No.	294,875.92
Fleet National Bank Account No.	1,108,307.99
Total	51,319,265.68
Total Participants' Account Balances as of December 31, 2000	(46,686,166.00)
Difference	4,633,099.68
Total Liabilities for 2001 as per financial statements (Exh. 158)	(100,752.00)
Difference Between Total Assets with Total Participants' Account Balances as of August 31, 2001 minus liabilities for the whole year 2001	\$4,532,347.68

Table Q

(Also, See Financial Statements As Of December 31, 2001 - Exh. 158, page 2)

The Annuity Fund's Net Assets Available for Benefits balance was never below total participants' account balances as reflected on Tables L, N, P and Q. The financial information that comprises these tables includes financial facts as shown in the statements from financial institutions and the Fund's audited financial statements. From December 31, 2000 through September 30, 2001, the Fund's "Net Assets Available for Benefits" was between \$2,811,386 to \$4,532,347.68 over the Total Participants' Account Balance of \$46,686,166.00. The financial facts show that the shortfall claimed by the Annuity Fund Trustees does not have any financial support. The allocation of the plan year 2000 investment earnings of \$1,871,978.00, should have been done in August 2001. Below, is a listing of all the amounts of Net Assets over the total participants' account balance for the time period where the allocation should have been possibly done, which was summarized on all four tables above. As illustrated below, there was not an instance during this time period that the Annuity Fund was in an underfunded condition:

Table L - as of 12/31/2000 (based on audited financial statements)	\$2,811,386.00
Table N - as of 12/31/2000 (based on statements)	\$2,886,078.00
Table P - as of 8/31/2001	\$5,115,925.00

Wassell and James Heinzman were interviewed August 17, 2007 and September 24, 2007, respectively. They were asked why the investment earnings for 2000 were not allocated when there were several millions sitting in other plan accounts with other banks when the 2000 financial audit was completed in August 2001. They both stated that these monies were already designated as employer contributions (Exhs. 110 & 111). Review of the records show that by the end of December 31, 2000, Fleet Bank Account No. [redacted] received employer contribution deposits totaling \$3,749,665. Also, from January through August of 2000, Annuity Fund money totaling \$5,499,998.98 was transferred from the Bank of New York, the former Fund custodian, to the Fleet Bank account. Details of the money transfers are summarized on Table H above. In his September 24, 2007 interview, James Heinzman stated that he was not aware of these transfers. In other words, during the 2001 audit of the Annuity Fund for plan year 2000, his auditing procedures failed to identify these transfers. (Exh. 111)

On April 5, 2007, James Heinzman's provided the NYRO a written response, which was forwarded by Schultheis & Panettieri counsel Thelen Reid & Priest LLP, regarding the use of \$381,099.30 investment earnings as an "offset" to the employer contribution transmittal dated October 19, 2001. (Exh. 109) In his response, he also included an additional explanation of his claim that as of December 31, 2000, the remaining Annuity Fund's Net Assets Available for Distribution, was only \$54,892.00. This corresponds to the results of the special project called "Annuity Fund Interest Allocation Analysis" dated September 28, 2001 and Table M summary. (Exh. 129 pages 2 and 6) According to James Heinzman's written response, the \$2,561,898.00 monies that were transferred on June 19, 2001 from Fleet National Bank Account No. 9427-741968 to New York Life were made to fund or augment the Annuity Fund's plan assets with New York Life. (Exh. 109) According to James Heinzman's spreadsheet that was attached, by deducting the \$2,561,898.00 from the Annuity Fund's bank account, the remaining Net Assets Available for Distribution was reduced to \$54,892.00. Also, James Heinzman included into play, the 2001 employer contributions of \$1,555,604.00, of which only \$1,174,505 was actually contributed as employer contributions. The inclusion of the 2001 financial data on this spreadsheet does not appropriately represent the Annuity Fund's financial condition as of December 31, 2000. With the spreadsheet showing the \$54,892.00 amount remaining as Net Assets as of December 31, 2000, the non-allocation of the 2000 investment earnings of \$1,871,978 appears to be completely legitimate.

Review of the transactions that occurred in the Fleet National Bank account show that the \$3,749,665 employer contribution deposits received by this account are contributions for 2000. Therefore, this money is a plan asset as of December 31, 2000. The \$2,561,898.00 that was transferred to New York Life on June 19, 2001, was part of the \$3,749,665. Also, the 2000 contributions are co-mingled with Annuity Fund money that was transferred from Fund custodian Bank of New York to Fleet Bank in 2000. (See Table H) According to James Heinzman's statement dated September 24, 2007, he was not aware that in 2000, \$5,499,997.00 of Annuity Fund money was transferred to the Fleet Bank account. (Exh. 123) James Heinzman's spreadsheet was designed to attempt to show that the use of the \$381,099.30 investment earnings was an "offset" and not a violation of ERISA, since there was not enough net assets available for benefits as of December 31, 2000. Likewise, the spreadsheet was designed to show that the amount \$54,892, was the Net Assets Available for Benefits as of December 31, 2000. The June 2001 transfer of \$2,561,898.00 was designed to show that these were employer contributions for 2000 that were needed to cover participants' balances as of December 31, 2000. The financial facts presented by this spreadsheet do not have materiality. They are not be supported by actual Annuity Fund bank records, trust statements and James Heinzman's own audit work papers as of December 31, 2000. Below, is a summary to show the factual financial status of the \$2,561,898.00 monies that were transferred on June 19, 2001 from Fleet National Bank Account No. [redacted] to Fund custodian New York Life: (Exh. 153)

<u>Fleet National Bank Account No. [redacted]</u>	
2000 - Fund monies received- transferred from former custodian	\$ 5,499,997.00
2000 - Received monies from CitiBank Account no. [redacted]	\$ 700,000.00



2000 - Received employer contribution deposits (Exhs. 180-182)	\$ 3,563,360.00
November 2000 - Transferred to New York Life	\$ 1,000,000.00
2001 (Jan) - Received deposit of 2000 contributions (Exh. 182)	\$ 186,304.80
Jan. 18, 2001 to June 8, 2001 - Received employer contributions for 2001	\$ 1,276,885.00 (Exh. 159)
June 19, 2001 - Transferred to New York Life (Exh. 153)	\$ 2,561,898.00

[Subsequently, on October 19, 2001, Fleet National Bank Account No. [redacted] transmitted employer contributions for 2001 to New York Life totaling \$1,555,604 (\$1,174,505.47 plus the \$381,099.30 investment earnings for 2000) (See Table C), the first employer contribution made in 2001. This transmittal was accomplished by first transferring monies from Fleet National Bank Account No. [redacted] to Fleet National Bank Account No. [redacted].]

The series of transactions above show that the \$2,561,898.00 monies were a combination of employer contributions for 2000, Annuity Fund assets that were transferred into this account in 2000 from the former Fund custodian, and the \$700,000 Annuity Fund asset money that was originally a Certificate of Deposit that matured in 2000. (Exh. 154) The Certificate of Deposit amount was originally \$612,860.69 that was deposited into a Citibank Annuity Fund account that had an account balance of \$178,339 as of December 31, 1999. (Exhs. 155 & 156) On March 14, 2000, \$700,000 was transferred to Fleet National Bank Account No. [redacted]. The bank statement that contains this transaction, has served as a Schultheis and Panettieri audit work paper. Also, on the bank statement are the initials of James Heinzman, as he was the first auditor to look at the statement. Audit procedures would have required the auditor to then trace where this money went. The bank statement of Fleet Bank shows that on March 14, 2000, \$700,000 was deposited into this account. (Exh. 157)

Tables L, N, O, P and Q above have financial facts which are supported by statements from the Annuity Fund custodian and the banks. The audited financial statements for plan year 2000, which were completed on August 2, 2001, and the audit work papers supporting them, were all prepared by Schultheis & Panettieri auditors and do not relate to the \$54,892.00. Subsequent financial statements from 2001 up to 2005, do not incorporate this amount into the process. See Table O)

When the allocation of the settlement was done on August 30, 2004, the Annuity Fund Trustees considered this allocation as the allocation of the investment earnings for plan year 2000. As reflected on both the Annuity Fund's financial statements and the participants' data base with New York Life, the receipts and subsequent allocation of the settlement monies are separate transactions and hence, have their own audit trails. These transactions created their own financial result in the Annuity Fund's financial statements and the participants' account database with New York Life. (Exhs. 102, 115 & 149) On the other hand, the purported allocation of the investment earnings for plan year 2000 on August 30, 2004, did not cause a transaction event or activity, and has no audit trail to follow. The purported shortfall to justify the non-allocation of earnings in August 2001, has no material fact and does not relate to any financial information in the Annuity Fund's financial statements from 1999 through 2005. (Table O & Exh. 149) Also, this purported shortfall was not reflected in the participants' data base with New York Life, the Annuity Fund's record keeper and custodian. As a matter of fact, the Annuity Fund participants' account balance as of December 31, 2000, provided by Vincent Panettieri back in June 2001 to the Fund custodian, was used as the initial starting account balance. Since then, there has been no transaction activity to record the purported shortfall and to adjust the participant's account in order to reflect the shortfall individually. When the settlement money was allocated to each participant on August 30, 2004, a single transaction entry called "Annuity Contribution" was entered into each participant's account statement. (Exhs. 102 & 115)

3. Annuity Fund Trustees used Annuity Fund assets to augment contributing employer monies that were transmitted to Annuity Fund Custodian New York Life in violation of ERISA Sections 404(a)(1)(A)(ii), (B) and (D), 406(a)(1)(D) and 406(b)(1) and (2).

The investigation revealed that Fund administrator Albert Wassell used monies from Annuity Fund accounts to augment employer contribution transmittals of contractors that were controlled by the employer trustees. The process was done by depositing Annuity Fund assets into two Fleet National Bank accounts that also held employer contribution monies. As first mentioned in this report, Annuity Fund money totaling \$5,499,997.00 was transferred from the former financial custodian to Fleet National Bank account number [redacted] from January 2000 through August 2000. From January 2001 through February 2002, this bank account received a total of \$3,093,655.47 in employer contributions from contributing employers. (Exhs. 159, 160 & 161) From August 29, 2001 through February 6, 2002, monies from this account were transferred to Fleet National Bank account number [redacted]. (Exh. 162) Before this account was closed, two employer contribution transmittals for \$1,174,505.47 and \$1,835,918.64 (totaling \$3,010,424.11), and \$355,214.94 were transferred to an Annuity Fund Citibank account. On May 1, 2002, money from this Citibank account augmented an employer contribution transmittal. As illustrated in Tables U and R below, a total of \$3,365,639.05, from the two bank accounts with Fleet National Bank, were used to transmit employer contributions. Both Fleet National Bank accounts were closed on June 3, 2002. Below, is a listing of the money transfers from Fleet Bank Account Number [redacted] to Fleet Bank Account Number [redacted].

08/29/2001	\$400,000
09/17/2001	381,000
10/03/2001	250,000
11/09/2001	700,000
12/12/2001	600,000
01/14/2002	475,000
02/06/2002	175,000
<b>Total</b>	<b>\$2,981,000</b>

Before Fleet Bank Account Number [redacted] was closed, \$230,615.21 was transferred to Fleet Bank Account Number [redacted] on March 6, 2002. (Exh. 163) Before this account was closed, check number 2012 for \$355,214.94 was issued on March 8, 2002. (Exh. 164) This check was deposited into Citibank Account Number [redacted] (Exh. 165) This Citibank account had an account balance of \$90,199.31 before the deposit of \$355,214.94. On April 18, 2002, deposits of \$306,099.80 and \$437,763.56 (totaling \$734,863.36) were deposited into this account. The money came from the Local 12 Welfare Fund which were employer contributions that were supposed to have been deposited into the Annuity Fund. (Exh. 166)

The \$355,214.94, \$306,099.80 and \$437,763.56 were then made part of the \$1,000,000.00 and \$90,333.69 that were transferred on April 25, 2002 from this account to Citibank Account Number [redacted]. (Exh. 167) On May 1, 2002, an employer contribution transmittal of \$1,199,828.59 was made. This money came from Citibank Account Number [redacted]. (Exh. 168) Below, is Table U which shows the use of Annuity Fund assets to augment employer contribution transmittals:

	Total money withdrawn from two Fleet National Bank Accounts & the 2000 investment earnings used as employer contribution transmittals	Total Employer Contribution Money Received by Fleet National Bank Account No. [redacted] from January 2001 until February 2002
		\$3,093,655.47
Fleet Bank Account No. [redacted] - for Employer Contributions dated 10/19/2001 (Exh. 99)	\$1,174,505.47	
*Fleet Bank Account No. [redacted] - for Employer	\$1,555,604.77	

Contributions dated 1/18/2002* (Exh. 168B)		
*Fleet Bank Account No. . . . . for Employer Contributions dated 1/25/2002* (Exh. 168B)	\$280,313.87	
Monies transferred from Fleet Account No. . . . . to Citibank Account that was used as part of Employer Contribution transmittals of \$1,199,828.59 dated 5/1/2002 (Exh. 168)	\$355,214.94	
Total monies used from two Fleet National Bank accounts for Employer Contribution transmittals 10/19/2001, 1/28/2002 and 5/1/2002	\$3,365,639.05	
Plus - Investment Earnings for 2000 used as an "offset" for Employer Contributions dated 10/19/2001 (Exh. 100)	\$381,099.30	
Total of monies used as employer contributions	\$3,746,738.35	
Minus - Actual monies received from employers	(\$3,093,655.47)	
<b>Total Fund Assets used to augment employer contribution transmittals</b>	<b>\$653,082.88</b>	

**Table U**

\* Both transmittals were transferred in one transmittal dated 1/28/2002 totaling \$1,835,918.64.

The summary below shows how the \$355,214.94, which was taken from Fleet National Bank Account No. . . . ., was used to augment the \$1,199,828.59 employer contribution transmittals dated May 1, 2002. This money was withdrawn from an account which contained Annuity Fund monies totaling \$5,499,997.00. The monies in this account came from a money transfer from the former custodian, as detailed in Table H above, and \$700,000 from a matured Annuity Fund Certificate of Deposit. (Exh. 154) As illustrated in Table U, only \$3,093,655.47 was received as actual employer contribution money in this account, however, \$3,365,639.05 was used in employer contribution transmittals. Annuity Fund assets totaling \$355,214.94 augmented the \$1,199,828.59 employer contribution transmittal dated May 1, 2002.

Date	Financial Institution	Amount
3/6/2002 - withdrawal (Exh. 163)	Fleet National Bank Account No. . . . .	(\$230,615.21)
3/6/2002 - deposit	Fleet National Bank Account No. . . . .	Balance: \$125,699.73 + \$230,615.21 = \$355,214.94
3/8/2002 - withdrawal (Exh. 164)	Fleet National Bank Account No. . . . .	(\$355,214.94)
3/8/2002 - deposit (Exh. 165)	Citibank Account No. . . . .	Balance: \$90,199.31 + \$355,214.94 deposit = \$445,414.25

4/18/2002 - deposit (Exh. 166)	Citibank Account No.	\$306,099.80 - withdrawn from Welfare Fund Citibank Account
4/18/2002 - deposit (Exh. 166)	Citibank Account No.	\$437,763.56 - withdrawn from Welfare Fund Citibank Account
4/24/2002 - withdrawal (Exh. 167)	Citibank Account No.	(\$90,333.69)
4/25/2002 - withdrawal (Exh. 167)	Citibank Account No.	(\$1,000,000.00)
4/25/2002 - deposit (Exh. 168)	Citibank Account No.	\$90,333.69
4/25/2002 - deposit (Exh. 168)	Citibank Account No.	\$1,000,000.00
5/1/2002 - transmitted (Exh. 168)	Citibank Account No.	(\$1,199,828.59) transmitted as employer contributions to New York Life

**Table R**

Citibank Account Number \_\_\_\_\_, which transmitted \$1,199,828.59 in employer contributions, only received indirectly \$306,099.80 and \$437,763.56 (totaling \$743,863.36) from the Welfare Fund. The difference of \$455,965.23, is the amount that did not come from employer contributions, however, it was used in an employer contribution transmittal.

The investigation revealed that for the employer contribution transmittals that were made on October 19, 2001 (Exh. 169), January 28, 2002 (Exh. 170), and May 1, 2002 (Exh. 171), the contractors that were shown to have remitted a total of \$1,006,666.55. (Exhs. 172 - 177) However, review of actual money received from these contractors only shows that \$585,216.71 was remitted (Exh. 178), for a difference of \$421,449.84. This amount represents money that was not received from these contractors but remitted as employer contributions to the financial custodian. Below, Table S explains the above:

Contractors	Total amount shown as employer contribution remittances on 10/19/2001, 1/28/2002 and 5/2/2002 to the Annuity Fund	Total actual money received and deposited into Fleet National Bank Account No.	Difference
	\$ (Exh. 172)	\$	(\$ 14,270.00)
	\$ (Exh. 173)	\$	(\$ 58,853.44)
	\$ (Exh. 174)	\$	(\$ 98,840.48)
	\$ (Exh. 175)	\$	(\$ 22,506.94)
	\$ (Exh. 176)	\$	(\$213,833.98)
	\$ (Exh. 177)	\$	(\$ 13,145.00)
<b>Totals</b>	<b>\$1,006,666.55</b>	<b>\$585,216.71 (Exh. 178)</b>	
<b>Total Difference</b>			<b>(\$ 421,449.84)</b>

**Table S**

(See Employer Contribution Deposits Received By The Annuity Fund In Plan Year 2000 (Exhs. 180 - 182))

The tables above and the exhibits presented show that Annuity Fund assets were used to augment employer contribution transmittals. The review was limited to the three transmittals mentioned above and was concentrated on the employer contributions that were claimed by employers

- The Fund Trustees transferred monies from the Welfare Fund to the Annuity Fund for non-fund related purposes in violation of ERISA Sections 404(a)(1)(A)(ii), (B) and (D), 406(a)(1)(D) and 406(b)(1) and (2).

The investigation revealed that the Welfare Fund made three money transfers to the Annuity Fund totaling \$1,237,691.50. The transfers occurred on the following dates: (Exh. 179)

June 6, 2001	\$489,577.50
November 30, 2001	\$431,127.00
January 8, 2002	<u>\$316,987.00</u>
Total	\$1,237,691.50

In his August 17, 2007 interview, Fund administrator Albert Wassell stated that these money transfers were for employer contributions allocated to the Annuity Fund and that there was no documentation to properly document these transactions. (Exh. 110) EBSA subpoena dated June 29, 2007, required the submission of all documentation that supports the transactions. Fund administrator Albert Wassell appeared in response to the subpoena without the required documentation (Exh. 119) Fund Counsel, Collieran, O'Hara and Mills, explained that if the documentation were to be submitted, it would be a huge project. (Exh. 183) During his September 24, 2007 interview, Mr. Heinzman stated that he did not review these transfers. (Exh. 110)

The investigation revealed that these money transfers were not recorded in either the Welfare Fund or Annuity Fund financial statements. Review of the Welfare Fund's financial statements for 2001 and 2002 show that the above money transactions were not recorded in the financial statements as funds transferred to the Annuity Fund. Also, there was no note to the financial statements to properly account for these transactions. (Exh. 184) Review of the Annuity Fund's financial statements for 2001 and 2002 show similar situations. These transactions are not reflected in the financial statements as funds transferred from the Welfare Fund. The notes to the financial statements of the Welfare Fund for plan years 2001 and 2002 do not reflect these transactions. (Exh. 158) Without any documented explanation and without these transfers being reflected in the financial statements of both Funds, these money transfers appeared to have been done for a non-plan related purpose. During the course of the financial audits of the Funds, the independent auditor did not review these transactions.

Review of the Welfare Fund's audit work papers show that the auditors created a spreadsheet called "Asbestos Workers Local 12 Welfare, Due (to) From Affiliates - Contributions December 31, 2001. (Exh. 185) This audit work paper shows that all employer contributions were supposed to have been received by the Welfare Fund and then properly disbursed to the other applicable Funds. However, as reflected in Exhibits 159 and 160, the auditor's work papers show that \$2,642,503.24 in employer contributions were directly received by the Annuity Fund. (Exh. 186) Also, the review shows that the other Funds directly received employer contributions. (Exh. 187) (Documents In The Exhibits Are Representative Samples Of Deposits For Each Of The Funds)

As stated on the audit work paper, the Welfare Fund has a system in place to record the receipts of all employer contributions received and all disbursements allocating contributions to the other Funds. Yet, the receipts of all the employer contributions and subsequent disbursements to the other Funds, were not reflected in the Welfare Fund's financial statements. Without the proper accounting of these monies, and the fact that employer contributions were directly received by the Annuity Fund, there is no indication that these transfers were for Fund related purposes.

## Miscellaneous

### Accounting Terminology

1. **Asset.** Anything that is owned and has money value.

(Source: Barron's Accounting, Fifth Edition, page 421)

2. **Net Assets Available for Benefits.** The difference between a plan's assets and its liabilities. For purposes of this definition, a plan's liabilities do not include participants' accumulated plan benefits.

(Source: AICPA Audit and Accounting Guide, Employee Benefit Plans, page 480)

As of August 2000, New York Life became the custodian of the Annuity Fund's assets including the participant loan receivable account. Also, starting in August 2000, participants could directly apply for loans against their account balance with the custodian. By June 2001, the participant loan receivable asset account started to generate income in the form of interest charged against participants loans. When a participant borrows money against his or her account balance, the amount of the loan is a receipt to the Plan, or an increase in the participant loan receivable asset account. When a participant repays the loan, there is a decrease in the participant loan receivable asset account and added to the participants account balance. (See Exh. 97B)

8

# Report of Interview

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



OIG Form 103 (OI-6/08)

Interview Date:	February 12, 2009	Location:	EBSA, 33 Whitehall Street, New York, NY	Case Number:	14-2601-00041A
Subject:	Robert Goldberg	Prepared By:	Robert W. Wyche RW	Date Prepared:	February 18, 2009

On February 12, 2009, Assistant Inspector General (AIG) Asa Cunningham and I interviewed Robert Goldberg 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: Robert C. Goldberg

Home Address:

Home Telephone:

Work Telephone:

EOD Date:

Title:

Years in

Current Position:



Mr. Goldberg was given a Garity warning at the onset of the interview, which he read and signed, agreeing to answer questions in this investigation. Mr. Goldberg was questioned regarding his responsibilities as a supervisory investigator and his supervision of Jose Castillo, Investigator, EBSA, New York RO, DOL. Mr. Goldberg advised that in late 2005, he was assigned as an acting manager in the EBSA New York RO. During this time period, EBSA New York Regional Director Jonathan 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.

According to Mr. Goldberg, in October 2005, he was assigned as an acting manager over a group of EBSA employees, which included Mr. Castillo. Shortly after being assigned this position, Mr. Castillo approached Mr. Goldberg 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 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 identified in the investigation.



Mr. Goldberg advised that his supervisor, Jeffery Gaynor, Deputy Director, EBSA, New York RO, DOL 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. This meeting was attended by Mr. Goldberg, Deputy Director Gaynor, Mr. Castillo and Robert Trejillo (another EBSA investigator, who was assisting Mr. Castillo with the investigation). It should be noted that Mr. Trejillo transferred to Chicago, Illinois sometime in at the end of 2005 or 2006 and is now working for a company in the private sector. 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 issued 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 described three meetings known as settlement meetings that Mr. Castillo had arraigned with the Asbestos Workers Local 12 Union members. Settlement meetings, as described by Mr. Goldberg, are scheduled after a Voluntary Compliance (VC) letter is sent to the union informing them of the various civil violations and issues identified by the EBSA investigator during the course of an investigation.

In regards to the first meeting, which was held shortly after Mr. Goldberg became Mr. Castillo's acting supervisor, Mr. Goldberg stated the following:

- He was told by Mr. Castillo that the Asbestos Workers Local 12 trustees had agreed with the issues in the investigation.
- He was under the impression that the meeting would only involve a small group of Asbestos Workers Local 12 trustees.
- He was surprised that the actual attendees of the meeting included not only union trustees but union attorneys, insurance carrier representatives and union accounting firm representatives.
- He identified the following individuals as attending the meeting:
  - Ira M Golub, Esq., Pruskauer Rose, LLP, 1585 Broadway, New York, New York, 212/969-3008.

- Denis Engel, Esq., counsel for the Asbestos Workers Local 12 Union, Colleran, O'Hara and Mills, L.L.P, 1225 Franklin Avenue, Suite 450, Garden City, New York, 11530, 516/248-5757.
- Sherwin Kaplan, Esq. Thelen Reid & Priest, LLP, 701 Eighth Street, NW, Washington, DC, 202/508-4218.
- He felt unprepared at the meeting because Mr. Castillo had provided him with very little information about the case.
- While he was giving his opening remarks and reviewing the issues identified by Mr. Castillo, he was interrupted by Mr. Engle who advised him that the Asbestos Workers Local 12 Union did not agree with any of Mr. Castillo's issues.
- Mr. Castillo offered no comment to Mr. Engle's statements during the meeting.
- Each time an issue was argued by the representatives of the Asbestos Workers Local 12 Union, Mr. Castillo failed to respond or argue his findings.
- He concluded the meeting by requesting that the Asbestos Workers Local 12 Union provide additional information regarding the investigative issues in this case prior to the next meeting.
- After the meeting, he met with Mr. Castillo and Mr. Trejillo and asked Mr. Castillo to provide him with all of the information and documents he had relating to the investigation.
- He felt Mr. Castillo was holding back information relating to the investigation and was not forthcoming with all of the related documentation.

Approximately one month later, Mr. Goldberg advised he had Mr. Castillo arraign another settlement meeting with the Asbestos Workers Local 12 Union representatives and made the following comments regarding this meeting:

- He began the meeting by outlining the background facts of the investigation, which he had received from Mr. Castillo.
- He was again interrupted by Mr. Engle, who informed him the facts of the investigation were incorrect.

- Mr. Castillo again failed to respond to Mr. Engle's allegations.
- Each time he attempts to discuss a specific issue, Mr. Engle disagrees with him.
- When he asked Mr. Castillo for his input Mr. Castillo made the statement that "whatever the accounting firm says is going to be a lie."
- Mr. Kaplan directed his attention to Mr. Castillo and asked him if he was calling his clients liars and criminals, to which Mr. Castillo responded "if the shoe fits," implying that they were.
- He ended the meeting by again requesting the Asbestos Workers Local 12 Union to provide additional documentation supporting their arguments against the issues identified in the investigation.

Mr. Goldberg believed that around December 2005, a third settlement meeting was scheduled to further clarify the facts disputed by the Asbestos Workers Local 12 Union. Sara Pifofsky, Esq., Thelen Reid & Priest, LLP, 701 Eighth Street, NW, Washington, DC, 202/508-4218, was present at this meeting in the place of Mr. Kaplan. Mr. Goldberg made the following statements regarding this meeting:

- While discussing the facts of the investigation, Ms. Pifofsky began to disagree with each fact.
- He once again agreed to review the facts of the issues identified in the investigation and again requested the Asbestos Workers Local 12 Union to provide additional documentation supporting their arguments against the issues identified in the investigation.
- Despite the Asbestos Workers Local 12 Union's disagreements, they assured him that they were interested in reaching a settlement.
- 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 meeting.

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 was asked if he ever confronted or initiated any disciplinary action against Mr. Castillo after these meetings regarding his lack of input and support. Mr. Goldberg responded that it was the

decision of EBSA management not to pursue these matters with Mr. Castillo at this time due to his involvement as a whistleblower.

During a meeting with Mr. Castillo prior to a fourth meeting with the Asbestos Workers Local 12 Union, Mr. Goldberg advised he suggested 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 with regards to 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.

Mr. Goldberg advised that sometime in early 2006, Regional Director Kay suggested briefing the Solicitor's Office (SOL), New York Region, DOL on the investigation in an attempt to reach an agreement on the various investigative issues. A meeting was then held at SOL, which was attended by Jennifer Weekley, Attorney, New York Region SOL, Dennis Kade, Supervisory Attorney, New York Region SOL, 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 report of interview (ROI) on the Asbestos Workers Local 12 fund investigation, which would then be submitted to SOL. It should be noted that under the direction of Regional Director Kay, the Asbestos Workers Local 12 fund investigation was at this time, 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 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.

The ROI for part I of the Asbestos Workers Local 12 fund investigation was prepared and submitted by Mr. Castillo and the case at SOL was assigned to Ms. Weekley. After several more discussions between the Asbestos Workers Local 12 Union, EBSA and SOL, a settlement was reached for part I of the investigation. Mr. Goldberg stated that during the settlement process, once SOL had become involved, Mr. Castillo never voiced any concerns or objections and was in full agreement with the settlement. As a result of this settlement, the insurance carrier for the Asbestos Workers Local 12 Union agreed to pay approximately \$172,000.

Mr. Goldberg revealed that while Mr. Castillo worked to gather additional evidence on the Asbestos Workers Local 12 funds investigation, he continued to discuss 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.

According to Mr. Goldberg, it was at this time that his working relationship with Mr. Castillo deteriorated, with each meeting becoming more confrontational. Mr. Castillo increasingly accused him of "being on the union's side" and making decisions to benefit the Asbestos Workers Local 12 Union. Mr. Goldberg stated Mr. Castillo began threatening him telling him to get a lawyer because he was going to "sue" him. 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.

In July 2008, Mr. Goldberg stated that Patricia Rodenhause, Regional Solicitor of Labor (RSOL), New York Region, DOL, 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 has not removed 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. Mr. Goldberg stated that SOL and EBSA has solicited interpretation from other sources to clarify some of the complex issues listed in Part II of the Asbestos Workers Local 12 fund investigation.

In December 2008, Scott Albert, Chief, Division of Reporting Compliance, Office of the Chief Accountant, (OCA) EBSA, DOL, telephone 212/693-8364, was requested by EBSA New York Region to attend a meeting with EBSA in New York to review the issues in Part II of the Asbestos Workers Local 12 fund investigation. This meeting was attended by Regional Director Kay, SOL attorneys Dennis Kade and Jennifer Weekley, Mr. Castillo and Mr. Goldberg. One of the identified issues in Part II of the Asbestos Workers Local 12 fund investigation by Mr. Castillo was a failure of the union trustees to allocate to participant accounts approximately \$1.8 million of Annuity Fund earnings. It was the conclusion of Mr. Albert this meeting that additional documentation would be needed from the Asbestos Workers Local 12 union trustees to determine if this action was a violation. According to Mr. Goldberg, Mr. Castillo was responsive and cooperative in this meeting and answered questions from Mr. Albert without incident.

Mr. Goldberg stated that to date, the issues in Part II of the Asbestos Workers Local 12 fund investigation have not been resolved and OCA has not made a final determination on their interpretation of these issues as they may or may not apply to civil violations.

Prior to the conclusion of the interview, Mr. Goldberg was asked about his relationship, if any, with Mr. Kaplan, who was identified by Mr. Castillo in his allegations, as a former employee of EBSA. Mr. Goldberg replied 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.

At the conclusion of the interview, Mr. Goldberg was asked to provide a written statement regarding the facts discussed during this interview and will swear to this statement at a later date.

AFFIDAVIT

City: New York Date: March 11, 2009

State: New York Time: 3:15 pm

Robert Goldberg, being duly sworn, deposes and states:

*R.G. 3/11/09*

Case Number: \_\_\_\_\_ Page 1 of 1 Deponent's Initials

OIG 118A (OLRFI 9/05)

*R.G.*  
*3/11/09*

This written statement is being provided pursuant to a request by the Office of the Inspector General regarding the allegation by Investigator Jose Castillo that Employee Benefits Security Administration (EBSA) management mishandled the investigation of the Local 12 Benefit Funds.

My name is Robert Goldberg and my current position is Supervisory Investigator in the New York Regional Office of EBSA, which is part of the Department of Labor (the Department). Currently, I manage 9 investigators and 1 law intern. As a Supervisory Investigator, I participate in the development and implementation of New York Regional Office policies and procedures. I provide policy, technical, and procedural guidance to the investigators in my group to help them conduct their investigations.

I became an Acting Supervisory Investigator on Thursday October 6, 2005. At that time, I became the manager of Investigator Jose Castillo and supervised Mr. Castillo's cases, including his investigation of the Local 12 Benefit Funds (the Funds).

On Thursday November 3, 2005, while I was talking with Deputy Regional Director (DRD) Jeffrey Gaynor by the office reception desk, Investigator Castillo came by indicated to us that there was going to be meeting with the trustees of the Local 12 Benefit Funds on Monday morning November 7, 2005 to discuss the issues in the Voluntary Compliance Letter that was issued to the Board of Trustees of the Local 12 Benefit Funds. Investigator Castillo stated that all of the trustees agree with our findings and that they just want to discuss the amount for each issue. DRD Gaynor stated that we should go over the issues tomorrow just in case they do not agree with all of them. We all agreed to meet in the afternoon of Friday November 4, 2005. On Friday afternoon, DRD Gaynor, Investigator Castillo, Investigator Trujillo (who helped Investigator Castillo on the case) and I met in the 12<sup>th</sup> floor conference room to discuss the issues in the Voluntary Compliance Letter. Investigator Castillo brought in loose papers and folders to support the issues. DRD Gaynor started reviewing the supporting documentation. DRD Gaynor asked Investigator Castillo questions about the issues and the supporting documentation provided. DRD Gaynor reviewed the documentation and indicated that he did not see that the documentation Investigator Castillo provided supported the issues that were raised. Investigator Castillo explained further the issues and the evidence he obtained. Investigator Castillo provided additional documentation to DRD Gaynor. However, DRD Gaynor still did not see that the documentation supported the issues raised. Investigator Castillo became agitated and stated to DRD Gaynor "You don't understand my English. You don't see my support." After two hours of reviewing records, DRD Gaynor indicated that he had to leave for the day. Then, DRD Gaynor stated that, "I am glad that the trustees agree on all of the issues because if they don't, we are going to have problems."

On Monday morning November 7, 2005, several union and employer trustees of the Funds, Denis Engel, Esq. from the law firm of Colleran, O'Hara & Mills LLP (counsel for the Funds and both the union and employer trustees), a representative from ULLICO with ULLICO counsel, Vincent Panettieri and James Heinzman (representatives from Fund accountant Schultheis and Panettieri), and Sherwin Kaplan, Esq. from the law firm



of Thelen Reid Brown Raysman & Steiner LLP (counsel for Schultheis and Panettieri) arrive to attend the meeting. I asked Denis Engel whether this was a settlement conference to discuss the final amounts owed on the issues because the Fund trustees agree with all of the issues. Mr. Engel indicated to me that the trustees disagreed with all of the issues. At that time, I knew that I needed to understand the case more, including the issues in the Voluntary Compliance Letter and what the trustees disagreed with. I informed attorney Sherwin Kaplan that I would not be able to meet with his client Fund accountant Schultheis and Panettieri until after all of the issues were discussed with the trustees. Sherwin Kaplan and the representatives of Schultheis and Panettieri agreed not to attend the meeting as long as they would be kept informed of what would be happening in the future and I agreed. Then, the union and employer trustees, counsel Denis Engel, the representative of Fund insurance carrier ULLICO with counsel, and Investigators Castillo, Trujillo and I went up to the 14<sup>th</sup> floor conference room to discuss the issues. During this meeting, Investigator Castillo was not sufficiently prepared, as he should have been, to discuss the issues with Plan officials. At this meeting that I conducted, I had to apologize to the Plan officials because the Department was not sufficiently prepared to discuss the issues. There was a disagreement with some of the facts that Investigator Castillo uncovered during the investigation. At the end of this meeting, all parties agreed that the trustees had to provide the Department with more information and documentation showing that the issues were not correct. Also, it was agreed that the Department will review certain documentation it had obtained to see whether the additional information provided at the meeting shows that certain issues that the Department had determined were not actually issues at all. Further, it was agreed that another meeting would take place in the near future.

After that meeting, I met with Investigator Castillo and we reviewed the documents he obtained which supported the issues raised. After this review, it became apparent to me that he did not have sufficient documentation to support the allegations. Also, Investigator Castillo's case files were disorganized. The failure to have sufficient documentation at such a late stage in the investigation, where it would have been expected of him, indicates that the investigation was not done properly.

On January 9, 2006, a second meeting occurred with the union and employer trustees of the Funds, Denis Engel, Esq. (counsel to the Funds and union trustees), Ira Golub, Esq. from the law firm of Proskauer Rose LLP (counsel to the employer trustees), counsel from the insurance carrier ULLICO, James Heinzman (from the accounting firm Schultheis and Panettieri), and Sherwin Kaplan, Esq. (counsel to the accounting firm Schultheis and Panettieri). Investigator Castillo and I attended this meeting. At this meeting, although it was Investigator Castillo's case, it was necessary for me to take a primary role because of Investigator Castillo's lack of objectivity in his analysis of the evidence. I started the meeting by briefing all parties on the aspects of the case, which I had been briefed on by Investigator Castillo. As I was doing this, the Fund trustees and attorney Denis Engel advised me that I did not have the facts straight. At this point, I needed Investigator Castillo's input regarding the specific facts, however, he did not provide that input. This was an embarrassment to me as a supervisor. As the investigator in the case, it was Investigator Castillo's responsibility to know the facts in the case to

provide input at the meeting. It appeared that Investigator Castillo had not been sufficiently prepared to discuss issues. The one statement that Investigator Castillo did make during the meeting was that he did not want to discuss the issues in the case, especially the issues regarding Fund accountant Schultheis and Panettieri, because whatever Fund counsel and a representatives of Schultheis and Panettieri are stating are lies and Schultheis and Panettieri are thieves. Then, attorney Sherwin Kaplan stood up asked Investigator Castillo, "Are you calling my clients liars and criminals? Is this a criminal investigation?" Immediately I stood up and told Mr. Kaplan that we are not calling his client criminals and that this is not a criminal investigation. After everybody calmed down the meeting continued. Also, at this meeting, I learned that Investigator Castillo had not followed proper EBSA procedures dealing with Fund officials who are represented. According to EBSA procedures, all communication would normally go through counsel if counsel has been obtained. Investigator Castillo had ignored Fund counsel and sent all of his requests directly to Fund officials. At the end of this meeting it was agreed that Schultheis and Panettieri would provide more documentation to support the work that they had performed and I would review the additional information provided along with the facts and issues before the next meeting.

After this meeting, I sat down with Investigator Castillo and verbally counseled him on not participating at the meeting. I told him that I was relying on him to provide me with the correct facts in the case. I told Investigator Castillo that when Fund counsel and the Fund trustees were disputing the facts and the issues, he should have participated when he disagreed with their statements. Further, I told Investigator Castillo that I felt embarrassed when I stated certain facts in the case, Fund counsel and the Fund trustees disagreed with those facts, and he did participate to discuss this disagreement.

Reviewing the facts and the issues has not been an easy task since Investigator Castillo has not been forthcoming with documentation that he maintained. Based on the documentation provided to me by Investigator Castillo, for negotiating purposes I decided to eliminate one of the issues in the Voluntary Compliance Letter. I did this since it appeared to me that the Fund trustees were starting to agree with some of the issues. The issue I eliminated related to the fees that Fund accountant Schultheis and Panettieri charged for work performed before and after trustee meetings. Typically, during the settlement process, facts and issues are discussed between the Department and Fund officials, additional evidence is provided, and a determination is made whether there is enough evidence to support the issues raised. Although they did not have a significant documentation to support all of the work performed, I felt that since the fees were not large and the explanation by Schultheis and Panettieri on the services they performed and why they did not have supporting documentation was plausible, I decided to eliminate the issue.

Before a third meeting with Fund officials, Investigator Castillo had again not properly briefed me about all important issues. Just prior to the third meeting, he suddenly showed me a letter sent to him from Plan participant \_\_\_\_\_ for back in November 2005, which should have been shown to me two months before.

Also, I learned that during the investigation, Investigator Castillo had revealed directly to a Fund participant what he received and what he had been doing during the investigation. This is against EBSA policy because it obviously can affect the case in a negative way.

On January 30, 2006, a third meeting occurred with the Fund trustees, Denis Engel, Esq., Ira Golub, Esq., an attorney representing ULLICO, James Heinzman from Schultheis and Panettieri and Sara Pikofsky, Esq. (instead of Sherwin Kaplan, Esq.) from the law firm of Thelen Reid Brown Raysman & Steiner LLP (counsel for Schultheis and Panettieri). Investigator Castillo and I attended this meeting. Again, Investigator Castillo was not properly prepared and did not sufficiently participate. At that meeting, Investigator Castillo was also not sufficiently objective. Also, it again became apparent to me that Investigator Castillo had not properly maintained documents that he had already received when attorney Denis Engel complained that Investigator Castillo had asked for the same documents two and three times. Again Investigator Castillo indicated during the meeting that he did not want to discuss the issues in the case because whatever Fund counsel and representatives of Schultheis and Panettieri are stating are lies and Schultheis and Panettieri are thieves. Then, once again, counsel for Schultheis and Panettieri, Sara Pikofsky, stood up and asked Investigator Castillo, "Are you calling my clients criminals? Is this a criminal investigation?" Again, I stood up and told Ms. Pikofsky that we were not calling Schultheis and Panettieri criminals and that this was not a criminal investigation. Also, during this meeting, I stated that I reviewed the issues and decided to eliminate the issue regarding the fees that Schultheis and Panettieri charged before and after trustee meetings. At the end of the meeting, it was agreed that additional information that Department needed from the Fund and Schultheis and Panettieri would be provided and once that information is provided, the other issues in the Voluntary Compliance Letter would be further reviewed.

After I eliminated the one issue, Investigator Castillo accused me of working with the Fund trustees to get rid of all of the issues and that I was against him. I decided that I would not eliminate any additional issues.

On May 18, 2006, I accompanied Investigator Castillo to interview the Fund Manager Al Wassell. Although I was to ask the questions, Investigator Castillo had not sufficiently briefed me regarding what information he had previously acquired during the investigation and what he had recently obtained from the Fund. I asked certain questions that Investigator Castillo apparently already had the information about. This caused embarrassment to me, delays in conducting the interview, and it negatively reflected the Department of Labor's professionalism. It was Investigator Castillo's responsibility to brief me on what information he already obtained and what information he had not obtained.

At a meeting on June 30, 2006 with Fund officials and James Heinzman from Fund accountant Schultheis and Panettieri, Mr. Heinzman indicated that the Department did not have all of the documentation regarding certain issues in the Voluntary Compliance letter. It was decided that Investigator Castillo would set up an appointment in the near future to go out to the offices of Schultheis and Panettieri to review the additional

documents regarding the issues. At this meeting, I informed all of the parties that I was going to Washington, D.C. on a detail for three months and would not be back until October 2006.

For the three months that I was down in Washington, D.C., Investigator Castillo not only did not set up that meeting with Schultheis and Panettieri, but did not do much work on the Local 12 Benefit Fund cases. He did send out tolling agreements where he failed to follow-up to get the signatures on the agreements from all pertinent parties. He did discuss with me in September 2006, while I was in Washington, D.C., the additional documents that I thought that he needed to obtain from the Funds and Schultheis and Panettieri. After this discussion, he did send out letters to these parties requesting documents. However, Investigator Castillo did not follow-up to get those documents when they were not received within a reasonable period of time. When I got back from Washington, D.C. in October 2006, I called Fund counsel to obtain the documents requested.

Shortly after I got back from Washington, D.C., Investigator Castillo showed me documentation that he received from Fund service provider New York Life that he claimed indicated that Schultheis and Panettieri were not honest. After I reviewed this documentation, I advised Investigator Castillo that without more information I could not agree with this assessment. I told Investigator Castillo that we needed to get an explanation of what the documentation represented before we accused anybody of any wrongdoing. Investigator Castillo did not like my answer and then went to other investigators in the office showing the documentation trying to get them to agree with his view. I felt this to be extremely out of line.

Towards the end of 2006, Investigator Castillo insulted me by telling me that I was the reason why the investigation was taking too long. Also, Investigator Castillo informed me that if I did not agree with his view that Schultheis and Panettieri were not honest, then he would contact James Hampton in OPPEM (higher level personal officials in the agency) in Washington, D.C. I reiterated to him that we still needed to get documentation to prove his allegation.

In November 2006, Investigator Castillo was advised by New York Regional Director Jonathan Kay not to discuss the case with Fund participant .

Also, in November 2006, New York Regional Director (RD) Jonathan Kay decided that the case should be reviewed by the New York Regional Solicitor's Office to see whether the documentation obtained supported the issues that Investigator Castillo raised. A meeting occurred between Dennis Kade, ERISA Counsel from the New York Regional Solicitor's Office, RD Jonathan Kay, Investigator Castillo and I regarding the remaining nine issues in the case. Dennis Kade reviewed the non-Schultheis and Panettieri issues and decided that these three issues were viable issues. Then, Dennis Kade started reviewing the remaining six issues which involved Schultheis and Panettieri. After reviewing the first three Schultheis and Panettieri issues, Dennis Kade determined that we did not have enough evidence to prove any violations, so it was agreed that those

three issues would be eliminated. Then, Dennis Kade had to attend another meeting and asked us to write a Report of Investigation (ROI) with supporting documentation on the remaining six issues in the case (the three Schultheis and Panettieri issues and three non-Schultheis and Panettieri issues), which is identified as Part I of the investigation.

In December 2006, subpoenas were issued to the Fund and Schultheis and Panettieri for additional records.

On March 20, 2007, RD Jonathan Kay sent an email to Investigator Castillo stating that it has taken a very long time for him to prepare the ROI and to have the ROI sent to me on or before March 26, 2007.

On April 30, 2007, the ROI on Part I of the investigation was referred to the New York Regional Solicitor's Office.

On December 14, 2007, a meeting occurred between Jennifer Weekly, Esq., an attorney with the New York Regional Solicitor's Office, Investigator Castillo and myself with the Fund trustees, trustee counsels Denis Engel and Ira Golub, and Daniel Aronowitz, President of ULLICO, to discuss a possible resolution of the case before the proposed complaint is filed involving part I of the investigation. Before this meeting, a copy of the proposed complaint was forwarded to the Fund trustees and their counsel. At the end of the meeting, the Fund trustees indicated that they will submit a comprehensive written offer stating their position in substance together with a monetary offer within approximately 30 days. The Fund trustees stated that they wanted to voluntarily resolve the case.

On January 31, 2008, Ira Golub sent a letter to New York Regional Solicitor's Office stating the Fund trustees offer in order to settle the issues in the Part I of the investigation. On April 17, 2008, the offer was revised. In July 2008, as the result of the stipulation of settlement agreement and side letter sent to the Fund trustees in June 2008, payments were made by the insurance carrier into the Funds to resolve the six issues in Part I of the investigation.

#### Part II - Local 12 Investigations Of The Annuity And Welfare Funds:

As stated previously, Investigator Castillo received a letter sent to him from Plan participant Henry Schroeder back in November 2005 alleging certain problems regarding the Local 12 Annuity Fund.

On November 30, 2007, the Report of Investigation (ROI) on Part II of the investigation was referred to the New York Regional Solicitor's Office. The following four issues are in the ROI – Part II: (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; and (4) The Fund trustees transferred monies from the Welfare Fund to the Annuity Fund for non-Annuity Fund related purposes.

On July 31, 2008, a meeting occurred between myself, Jennifer Weekly, Esq. (from the New York Regional Solicitor's Office), Denis Engel, Esq. (Fund and union trustee counsel), Ira Golub, Esq. and Kerri Blumenauer, Esq. (both from the law firm of Proskauer Rose LLP, counsel for the employer trustees), and James Heinzman (from Fund accountant Schultheis and Panettieri), to discuss the issues in Part II of the NYRO investigation of the Funds. The New York Regional Solicitor's Office requested that Investigator Castillo not attend this meeting. I do not remember whether I told Investigator Castillo that the Solicitor's Office did not want him to attend this meeting or RD Jonathan Kay did. In summarizing the meeting, Denis Engel and Ira Golub stated their belief that all allegations in the DOL's June 5, 2008 letter were merit less. They further stated their willingness to cooperate fully in providing any information or documentation necessary to aid in resolving the case.

On September 17, 2008, Jennifer Weekly, Esq. sent Denis Engel and Ira Golub a letter requesting additional information on the first issue and supporting documentation on the third and fourth issues in the ROI - Part II.

On October 27, 2008, Jennifer Weekly, Esq. sent Denis Engel and Ira Golub a letter with enclosed documents relating to the Department's first issue in the ROI - Part II (which concerns the use of approximately \$381,099 in Annuity Fund earnings for the year 2000 as an "offset" of employer contributions forwarded to the Annuity Fund's investment account on or before October 19, 2001). The Department of Labor was enclosing these documents in order to facilitate the trustees understanding and a resolution of the issues.

On October 30, 2008, Ira Golub was responding to Jennifer Weekly's September 17, 2008 letter requesting additional information regarding Part II of the investigation. He provided binders containing requested supporting documentation for remittance of two selected employers. Also provided were supporting documentation regarding three contribution deposits into the Welfare Fund. Ira Golub indicated that the additional information requested regarding the first issue (the \$381,099) would be sent later.

On November 26, 2008, Ira Golub provided additional information to clarify what transpired in 2001 regarding the \$381,099 plan earnings.

On December 6, 2008, RD Jonathan Kay sent an email to Fund participant Henry Schroeder telling him that the issues that he identified in his emails to Investigator Castillo (discrepancies in amount of loan receivables, the "net allocable amounts" in 1994, 1996 and 1998, as well as a real estate tax deduction) were relatively new to the Department; the last two just having been brought to the Department's attention last Thursday December 4, 2008, by your -e-mail. Consequently, RD Jonathan Kay indicated Mr. Schroeder that the Department had not engaged in extensive fact-finding on these three issues. RD Jonathan Kay added that the Department will, however, review them.

R. J.  
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In early December 2008, RD Jonathan Kay decided to have Scott Albert, Chief of the Division of Reporting Compliance, from EBSA's Office of Chief Accountant (OCA), review the accounting related issues, the first two issues in Part II of the ROI. RD Jonathan Kay did this since Investigator Castillo had sought advice from Scott Albert in the past. As a result, on December 8 and 9, 2008, RD Jonathan Kay sent a letter and email, respectively, with documents attached to Scott Albert in order for him to familiarize himself with the first two issues of Part II of the ROI. Also, during this time, Investigator Castillo also sent documents relating to those issues to Scott Albert.

On December 15, 2008, RD Jonathan, Kay, Investigator Castillo, Dennis Kade, Esq. and Jennifer Weekly, ESQ (from the New York Regional Solicitor's Office) and I met with Scott Albert from OCA in the New York Regional Office. This meeting was set up in order for Scott Albert to get additional information regarding the first two issues of Part II of the ROI from Investigator Castillo and to discuss the documents that were forwarded to him. Also, Scott Albert is reviewing the new allegation brought up by Fund participant Henry Schroeder involving the allocation analysis performed by Schultheis and Panettieri. At the end of the meeting, Scott Albert indicated that he will review all of the documentation provided and will produce a report of his findings on the first two issues of Part II of the ROI and the Schultheis and Panettieri allocation analysis. Currently, Scott Albert has not issued a report of his findings.

On January 28, 2009, Ira Golub sent to the Department additional documentation requested regarding the ROI – Part II of the investigation. This documentation included cashed checks reflecting contribution payments made to the Local 12 Annuity Fund during the period from January 1, 2001 through March 10, 2002 with respect to three contributing employers to the Funds.

The investigation of Part II of the ROI is ongoing.

Recently, when I asked Investigator Castillo for documents to review related to Part II of the ROI, he stated to me that he was going to sue me, so I better get an attorney.

Also, I want to address the following information that was provided in an email sent by Participant \_\_\_\_\_ to the Department. \_\_\_\_\_ indicated that Trustee Nick Grgas, who attended one of the settlement meetings, stated the following: "...when the agent is speaking at meetings, his supervisor is behind him shaking his head negatively, with his eyes looking skyward in an exasperated fashion." \_\_\_\_\_ goes on to say that Trustee Nick Grgas stated that the supervisor was approached after this meeting and was asked whether he could "intervene favorably in the funds behalf...This same supervisor said there's nothing I can do directly...he's the agent-in charge." I am assuming that the reference to "agent-in-charge" means Investigator Castillo.

First of all, Investigator Castillo did not speak at the meetings except to allege Schultheis and Panettieri were liars and criminals. I did not shake my head negatively and look skyward in an exasperated fashion. Further, I would never make the statement or any

other Supervisory Investigator would make the statement or representation that the investigator is the person in charge and makes the final decision on an investigation.

In conclusion, as an EBSA manager, I have not impeded this investigation or have cause this investigation to be stalled. I have managed this investigation like any other investigation that I have managed. In Part I of this investigation, there were ERISA violations that the Fund trustees corrected through a settlement with the Department. Part II of this investigation contains four issues. These four issues are complex due to the fact that two of the issues relate to the interpretation of the accounting work performed by Fund accountant Schultheis and Panettieri and the other two issues relate to reviewing numerous supporting documents to trace Fund money transfers. Currently, we are reviewing supporting documentation regarding the issues that was recently provided by the Fund trustees.



Statement of Robert Goldberg Date: March 11, 2009

R.G. 3/11/09

I have read this statement consisting of 11 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 11<sup>th</sup> day of March, 2009

Robert Goldberg  
Deponent's Signature

Subscribed and sworn before:

R. U. Dale  
Special Agent

3/11/09  
Date

Witnessed by: [Signature] Case Number: 14-2601-0004 IA

Title: ATG

OIG 118C (OLRFI 9/05)

R.G.  
3/11/09

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# Report of Interview

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



OIG Form 103 (OI-6/08)

<b>Interview Date:</b>	March 11, 2009	<b>Location:</b>	33 Whitehall Street Suite 1200, New York, NY	<b>Case Number:</b>	14-2601-0004 IA
<b>Subject:</b>	Jonathan Kay	<b>Prepared By:</b>	Robert W. Wyche <i>rw</i>	<b>Date Prepared:</b>	March 20, 2009

On February 12, 2009, Assistant Inspector General (AIG) Asa Cunningham and I interviewed Jonathan Kay, Regional Director, 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: Jonathan Kay

DOB:

Home

Address:

Home Telephone:

Work Telephone:

EOD Date:

Title:

Years in

Current Position:

Regional Director Kay was given a Garity warning at the onset of the interview, which he read and signed, agreeing to answer questions in this investigation. Regional Director Kay was questioned regarding his responsibilities as a EBSA supervisor and his supervision of Jose Castillo, Investigator, EBSA, New York RO, DOL. Regional Director Kay advised that as Regional Director of the New York Region of EBSA, he is responsible for the supervision of all EBSA investigators, group supervisors and upper management of EBSA.

Regional Director Kay advised that due to his previous assignments at EBSA, he was familiar with the Asbestos Workers Local 12 Funds investigation and Mr. Castillo's involvement with the case as the lead investigator. Regional Director Kay was also familiar with Mr.

's involvement with the Asbestos Workers Local 12 Funds investigation stating that Mr. is an Asbestos Workers Local 12 Union fund participant and a frequent caller to EBSA. Mr. contacted EBSA and requested them to initiate an investigation into the Asbestos Workers Local 12 Union.

Regional Director Kay provided the following information regarding the initial phase of the Asbestos Workers Local 12 Funds investigation:

- The investigation began in 2005 shortly before Mr. Castillo's immediate 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.
- Robert Goldberg was given the first acting group supervisor assignment becoming Mr. Castillo's immediate supervisor.
- Mr. Castillo had scheduled a meeting with the Asbestos Workers Local 12 Union trustees to discuss various findings related to the investigation.
- Mr. Goldberg complained that Mr. Castillo was not forthcoming with information at the meeting and Mr. Castillo was non-responsive to questions directed at him by Mr. Goldberg and union trustees. Mr. Goldberg also reported that when Mr. Castillo did speak at the meeting, he contradicted himself with incorrect facts.

Regional Director Kay stated he received similar complaints from Mr. Goldberg referencing several other meetings involving Mr. Goldberg, Mr. Castillo and representatives from the Asbestos Workers Local 12 Union. Regional Director Kay did not know if Mr. Goldberg counseled Mr. Castillo on his behavior during the meetings but added that the meetings were not a failure due to Mr. Castillo's behavior. Regional Director Kay believes EBSA did accomplish things during these meetings and remarked that the numerous meetings were not uncommon in these types of investigations.

According to Regional Director Kay, EBSA has no set policy directing who actually runs investigative meetings with union representatives. Regional Director Kay believes that Mr. Goldberg or former EBSA Deputy Director Jeffery Gaynor played a significant role in the meetings due to their hands on nature.

Approximately three or four months later, Nichelle Langone, senior investigator, EBSA, New York RO, DOL, replaced Mr. Goldberg as Mr. Castillo's immediate acting group supervisor. Regional Director Kay made the decision to keep Mr. Goldberg as Mr. Castillo's supervisor on matters pertaining to the Asbestos Workers Local 12 Fund investigation due to the accounting issues involved in the investigation and the fact that Mr. Goldberg had an accounting background. Ms. Langone, who was an attorney with no accounting background, would have oversight of all other areas of Mr. Castillo's work.

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. Mr. Castillo also complained to Regional Director Kay 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 he advised Mr. Castillo and Mr. Goldberg to work together to resolve any disagreements.

Regional Director Kay realized there were areas of the Asbestos Workers Local 12 Funds investigation that had complex accounting issues that needed to be resolved, when there were other areas of the investigation that could potentially be settled. Regional Director Kay made the decision to divide the investigation into two parts and submit Part 1 to the Office of the Solicitor (SOL), New York Region, DOL 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 several issues remaining 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 fueled Mr. Castillo's beliefs that his investigation was being undermined. One of the issues Regional Director Kay questioned was whether or not there was a shortfall in the Asbestos Workers Local 12 Annuity Plan accounts after the Annuity Plan had elected to go to a self directed "go live" program. Mr. Castillo believes that there is no threshold shortfall and blames the inconsistencies in the Annuity Plan account balances on the Asbestos Workers Local 12 Union accounting firm of Schultheis and Panettieri.

Regional Director Kay described the following four unresolved issues that are present in Part 2 of the Asbestos Workers Local 12 Funds investigation:

1. Concerns that certain portions of the Asbestos Workers Local 12 Union earnings from calendar year (CY) 2000 were used to offset \$374,000 in employer contributions.
2. CY Year 2000 Annuity fund earnings in the amount of \$1.9 million were never allocated to the Asbestos Workers Local 12 Union Annuity fund plan participants. The Asbestos Workers Local 12 Union trustees claimed the money was never allocated due to a shortfall resulting from a union fraud scheme and to fund a "go live" plan for the fund. In addition, \$1.3 million, which was recovered from the fraud lawsuit was then allocated to the Annuity fund. This raised the question whether or not CY 2000 Annuity Fund earnings were ever allocated to the Asbestos Workers Local 12 Annuity fund plan participants.

3. An existing discrepancy in the amount of employer contributions, which were received by the Asbestos Workers Local 12 Union Annuity fund raised the question of whether the Annuity fund received all of the contributions owed to it by the employers.
4. Three unexplained transfers from the Asbestos Workers Local 12 Annuity fund to the Welfare fund in the amounts of \$200,000 to \$300,000.

According to Regional Director Kay, EBSA management had numerous discussions and debates with Mr. Castillo relating to these issues. In regards to the issue of 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, Office of Regulation and Interpretations (ORI), DOL, Washington, DC. 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 Jeffrey Monhart, Chief, Division of Field Operations, Office of Enforcement, EBSA, Washington, DC, asking Mr. Monhart to obtain an interpretation from ORI on the questioned investigative issues. 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, stating he specifically asked them for their interpretation of the questioned issues. In describing the complexity of these accounting issues, Regional Director Kay stated he also solicited the Office of the Chief Accountant (OCA), EBSA, Washington, DC for their interpretation.

Regional Director Kay stated that in a response from ORI, Mr. Lurie reported that the Asbestos Workers Local 12 Union trustees may have been correct in their distribution of participant funds, if their actions were temporary to provide funding for the Annuity plans self directed "go live" initiative. It was ORI's opinion that the deviation from the plan document may be legal.

EBSA is still awaiting a final report from OCA regarding their interpretation of the questioned issues in the Asbestos Workers Local 12 Funds investigation. According to Regional Director Kay, ORI and OCA were examining issues one and two of Part 2 of the Asbestos Workers Local 12 Funds investigation. EBSA has been in the process of obtaining addition information from the Asbestos Workers Local 12 Union trustees in an attempt to reach conclusions on issues three and four.

Regional Director Kay stated Mr. Castillo's theory is that participant loans are plan assets and should be treated as cash. Mr. Castillo claims the participant loans should be counted

as plan assets; therefore, a shortfall did not exist and the Asbestos Workers Local 12 Annuity fund did in fact have enough money to initiate the fund's self directed program and "go live." Regional Director Kay believes that loans are plan assets; however, he also believes the loans should not be treated as cash because they have already been given to the Annuity plan participants.

According to Regional Director Kay, he decided to allow Mr. Castillo to submit a Report of Investigation (ROI) to SOL for Part 2 of the Asbestos Workers Local 12 Funds investigation, which was completed and submitted 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 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.

Regional Director Kay confirmed he had been contacted by Patricia Rodenhausen, Regional SOL (RSOL), New York Region, regarding concerns she had over 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 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.

In regards to Mr. Castillo's allegation that Regional Director Kay interfered with the deposition of James Heinzman, CPA, Schultheis and Panettieri, Regional Director Kay provided the following information:

- He was present during a telephone interview of Mr. Heinzman with Mr. Goldberg and Mr. Castillo.
- He did not tell Mr. Castillo or Mr. Goldberg to obtain a deposition from Mr. Heinzman.
- EBSA's usual policy is to conduct interviews, not depositions.
- He does not know if Mr. Goldberg or Mr. Castillo scheduled the interview with Mr. Heinzman.
- He did not advise Mr. Goldberg or Mr. Castillo to provide Mr. Heinzman with a list of questions prior to the interview.

- He acknowledged being present during the interview due to the attention the investigation is being given resulting from Mr. Castillo's and Mr. complaints.

Regional Director Kay made the following statements regarding his relationship with Sherwin Kaplan, attorney, Thelen Reid and Priest, LLP, Washington, DC. (This is the law firm representing the accounting firm of Schultheis and Panettieri.):

- 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.

Regional Director Kay made the following statements regarding an incident where Mr. Castillo called Mr. Goldberg a liar:

- He believes the incident took place sometime in the summer of 2008 during a meeting in his office with Mr. Goldberg and Mr. Castillo.
- During this meeting, Mr. Castillo disagreed with statements Mr. Goldberg was making regarding the Asbestos Workers Local 12 Funds investigation. Mr. Castillo called Mr. Goldberg a liar several times. Mr. Castillo was asked to leave his office.
- He issued Mr. Castillo a counseling letter for his inappropriate behavior.

Regional Director Kay 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 Region 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. 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 denies 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.

At the conclusion of the interview, Regional Director Kay was asked to provide a written statement regarding the facts discussed during this interview and will swear to this statement at a later date.

AFFIDAVIT

City: New York Date: 4/9/09

State: New York Time: 2:50 PM

JONATHAN KAY, being duly sworn, deposes and states:

4/10/09 JK

Case Number: 14-2601-0004-JA Page 1 of 9 Deponent's Initials

This statement is in response to my March 10, 2009 interview with Robert W. Wyche and Gene Cunningham from the Office of Inspection and Special Investigation, U.S. Department of Labor, Office of Inspector General with regard to allegations made by Employee Benefits Security Administration ("EBSA") employee Jose Castillo.

1. I have been continuously employed in EBSA's New York Regional Office ("NYRO") since October 1996. From October 1996 through November 2001 I served as the Associate Regional Director. In November 2001, I was promoted to the Deputy Regional Director position and served in this capacity until July 2005. In July 2005 I was promoted to the Regional Director position.
2. Mr. Castillo's investigations of the Local 12 benefit funds commenced in February 2002 when cases were opened on the Annuity and Welfare Fund. Additional cases were opened on the Pension, Vacation and Education Funds in October 2002, September 2003 and November 2003, respectively. Although I was not Mr. Castillo's first line supervisor, I had a passing familiarity with the Local 12 investigations prior to becoming Regional Director.
3. Jonathan Brown was Mr. Castillo's first line supervisor from at least 2001 until Mr. Brown's retirement in August 2005. After Mr. Brown's retirement, I had three Senior Investigators rotate as acting group supervisors for what had been Mr. Brown's group that included Mr. Castillo. The purpose of these rotational assignments was to assess the individuals' abilities to perform the group supervisor's duties to help me make a decision as to who would I would select as the permanent supervisor. Each of the acting supervisors served for approximately four months. Two of these acting group supervisors were Robert Goldberg and Nichelle Langone, both of whom were promoted to the group supervisor position in or about October 2006.
4. Mr. Castillo's investigations of the Local 12 employee benefit plans had two phases. The first phase involved several findings that were presented to the Trustees of the Local 12 Plans in a voluntary compliance letter that the NYRO issued on May 3, 2005 that was issued by the NYRO. These findings were not resolved by the NYRO and so the findings were referred to the Regional Solicitor's Office in New York in or about May 2007. The issues were resolved by the Solicitor's Office in a written Stipulation executed in May and June 2008 that provided that the Trustees of the Local 12 Plans would restore \$172,270.28 to the various Funds.
5. In or about November 2005, EBSA received complaints about the Local 12 Funds from a participant in the Plans that raised new issues that warranted further investigation. These new issues constituted phase two of the Local 12 investigation and were investigated by Mr. Castillo. The phase two findings were forwarded to the Solicitor's Office in December 2007. These phase two findings

were not incorporated in a voluntary compliance letter to the trustees as the phase one issues were already being handled by the Solicitor's Office.

6. There were four findings in phase two:
  - a. \$374,768 of the Annuity Fund's investment earnings during the year 2000 (which had grown to \$381,099.30 by September 2001) were used to relieve certain employers of their obligation to forward contributions to the Annuity Fund;
  - b. The Annuity Fund's investment earnings that accrued during the year 2000 were never allocated to the participants' accounts. The year 2000 earnings totaled approximately \$1.8 million;
  - c. In 2001 and 2002 \$421,449.84 of employer contributions due from employers who had representatives on the Annuity Fund's Board of Trustees were not remitted by said employers although the employers were credited with making such contributions. Rather, the \$421,449.84 was taken from other Annuity Fund assets.
  - d. The Local Welfare Fund made three transfers to the Annuity Fund in June and November 2001 and January 2002, totaling \$1,237,691.50. No explanations were provided for these transfers.
7. It is standard EBSA practice to discuss investigative findings with the officials of the employee benefit plan that is the subject of the investigation. It is my understanding that one or more meetings were convened with the Trustees of the Local 12 Plans and/or their counsel to discuss the investigative findings. Based on discussions with Robert Goldberg, Mr. Goldberg expressed his concern about Mr. Castillo's conduct during at least one of these meetings. Specifically, Mr. Goldberg advised me that when he asked Mr. Castillo to explain certain details of the investigation, Mr. Castillo would not respond. Additionally, Mr. Goldberg advised me that Mr. Castillo's account of investigative activities during one or more meetings with the Trustees differed from what Mr. Castillo has previously told Mr. Goldberg about the very same activities.
8. As noted above, from in or about October 2005 to September 2006 Mr. Castillo had three different first line supervisors, including Mr. Goldberg and Ms. Langone. Effective in October 2006, I selected Ms. Langone as the supervisor to Mr. Castillo's group. At the same time, I selected Mr. Goldberg as the supervisor of a second investigator group.
9. I decided that Mr. Goldberg would continue to supervise Mr. Castillo on the Local 12 cases notwithstanding that Ms. Langone was Mr. Castillo's supervisor on all other cases. My rationale for doing so was that the Local

12 case involved issues regarding how accountants conduct their audits and bill for their services and what type of records accountants retain. Additionally, the issues that Mr. Castillo was investigating involved interpretation of numerous financial statements compiled by Local 12 and related parties as well as relevant accounting principles. Given these circumstances, I thought that Mr. Goldberg, who is an accountant and for several years served as an instructor at EBSA's national accounting course, was better suited to supervise this case than Ms. Langone who had minimal, if any, accounting training, other than EBSA's course, and was an attorney by training.

10. I am aware that Mr. Castillo alleges that Mr. Goldberg may have made appropriate grimaces and/or gestures at a meeting that they both attended with the Trustees of the Local 12 Plans. I believe that this meeting was limited to the phase one issues. As I recall, these actions were not observable by Mr. Castillo but were subsequently brought to Mr. Castillo's attention by a third party.
11. The phase one issues were resolved to everyone's satisfaction. Therefore, I did not think that activities that may have occurred during the resolution of phase one were the subject of Mr. Castillo's complaint to the OSC. If my understanding is correct, I do not see what relevance Mr. Goldberg's alleged actions have to Mr. Castillo's complaint that the NYRO's management undermined phase two of the investigation.
12. During discussions with Mr. Castillo regarding phase two of the Local 12 investigation, both Mr. Goldberg and I had questions about how the investigative findings were derived and whether they were supported by the weight of the evidence. The primary issue that was discussed involved whether or not the Annuity Fund had sufficient liquid assets to fund the total amount of the participants' account balances: the so-called "shortfall" issue. More specifically, the Trustees decided that as of June 2001 the participants would have the opportunity to decide how the amounts that were credited to their accounts would be invested ("self-direction). Prior to June 2001 the Trustees, assisted by investment advisors, decided how the Annuity Fund's assets would be invested.
13. In any event, the Trustees had to make certain that come June 2001 there were sufficient liquid assets in the Annuity Fund to enable the participants to direct the amount of assets that were credited to each of their accounts. At the beginning of 2001 the total amount of the participants' account balances totaled approximately \$46.6 million. In determining whether the Annuity Fund had sufficient assets to cover the \$46.6 million amount, Mr. Castillo insisted that approximately \$2.7 million of Annuity Fund assets that had properly been loaned to participants, but not yet repaid to the Annuity Fund should be included in the amount available to cover the

\$46.6 million amount. Mr. Goldberg and I questioned whether it was appropriate to include the \$2.7 million as it was a receivable that was not yet available to be distributed to participants to invest.

14. The importance of whether or not there were sufficient liquid assets to cover the \$46.6 million is that if the \$2.7 million is excluded, there were not sufficient liquid assets to cover the \$46.6 million. If there was such a shortfall, the Trustees' assertion that the \$1.8 million of earnings for 2000 was used to make up part, or all, of the shortfall is more plausible.
15. During the summer of 2007, Jeffrey Monhart who worked in EBSA's Office of Enforcement in Washington DC was detailed to the NYRO for approximately 90 days and reported to me. During this period he may have recommended that the NYRO take a deposition of James Heinzman who was an accountant with the accounting firm of Shulteiss & Panetierrri ("S & P"). The Annuity Fund hired S & P in or about 1999 for several projects. Mr. Heinzman was the Annuity Fund's spokesperson during the Local 12 investigation on accounting issues.
16. Mr. Heinzman was not deposed. However, he was interviewed by phone by Mr. Goldberg and Mr. Castillo. I do not believe that I decided to forego a deposition of Mr. Heinzman. Rather, I was merely informed that an interview was scheduled. I sat in on the phone interview. While I would not normally do so, I felt that it was necessary to become more involved in the case because the case was taking a long time to resolve and was receiving a lot of scrutiny from my national office as well as being the subject of frequent inquiries from a participant in the Annuity Fund about the status of the case. I believed that by becoming more familiar with the facts I might be able to expedite a resolution.
17. As noted above, the NYRO forwarded the phase two findings to the Regional Solicitor's office in December 2007. In early April 2008 the Regional Solicitor's office requested that the NYRO seek guidance from EBSA's national office on certain phase 2 issues. Initially I drafted a memo, dated April 4, 2008, to Jeff Monhart in EBSA's Office of Enforcement requesting that he obtain guidance from EBSA's Office of Regulations and Interpretations ("ORI"). However, I subsequently decided to send an email directly to David Lurie in ORI which I did send on April 4, 2008 and sent a courtesy copy to Mr. Monhart. In the April 4<sup>th</sup> email, I sought advice with regard to the third issue in phase two of the investigation. Specifically, I asked whether assuming that certain contributing employers had not remitted all required contributions to the Annuity Fund, could the Trustees use other Annuity Fund assets to make up for the missing contributions. On April 7, 2008 I sent a second email to Mr. Lurie asking three additional questions that pertained to phase two.

Mr. Lurie provided answers to all questions in an e-mail dated April 9, 2008.

18. On April 7, 2008, Mr. Castillo sent me an email stating that my April 4th description of the facts on issue 3 was incomplete and could result in an inaccurate answer. In my view, the original question posed in the April 4, 2008 email is no longer relevant as the basic question in issue 3 is whether the employers remitted all the contributions that they were required to submit. The issue of what options the Trustees had to make up for missing contributions, assuming all contributions were not remitted, is a separate question from the core question in issue 3 and only becomes relevant once it is determined that all contributions were not remitted.
19. On Thursday, May 15, 2008 Mr. Castillo, Mr. Goldberg and I were discussing the Local 12 case in my office. At one point Mr. Castillo said that Mr. Goldberg had previously told Mr. Castillo that the phase two findings would not pass the "smell" of litigation. Mr. Goldberg denied that he made such a statement. Mr. Castillo immediately said that Mr. Goldberg was a "liar." I told Mr. Castillo not to use such language. He repeated that Mr. Goldberg was a liar at least two more times. At that point I directed Mr. Castillo to leave my office. I issued a counseling memo to Mr. Castillo on May 20, 2008 advising him that calling Mr. Goldberg, or anyone in the NYRO, a "liar" was unacceptable conduct.
20. After reviewing the investigative findings in phase two, the New York Regional Solicitor's Office scheduled a meeting with the Trustees' counsel for July 31, 2008. Prior to the meeting Mr. Castillo's communications with the Solicitor's Office and others caused the Solicitor's Office to seriously question Mr. Castillo's objectivity and ability to maintain a professional demeanor. As a consequence, the Solicitor's Office was concerned that Mr. Castillo would be disruptive at the July 31, 2008 meeting. The Solicitor's Office advised me that they would not permit Mr. Castillo to attend the meeting. I believe I conveyed this information to Mr. Castillo at a meeting that Mr. Goldberg also attended. Mr. Castillo was surprised and indicated that he did not understand why he could not attend.
20. Mr. Castillo was given a multi-page written summary of the July 31, 2008 meeting and asked to comment on the content of a post-meeting letter that the Solicitor's Office sent to the Trustees' counsel asking for additional information. Some of Mr. Castillo's comments were incorporated in the letter that was ultimately sent to the Trustees' counsel.
21. Mr. Castillo and participants have alleged that the NYRO should have commenced a criminal investigation of the Local 12 employee benefit plans. The first time that I became aware of any such

allegations was from Mr. . At that time Mr. wanted to know why the NYRO did not initiate a criminal investigation of the misappropriation of plan assets by the former Fund Administrator, Jerome Market, and the former accountant that occurred during 1990-1999. In or about 2007 Mr. first urged me to start a criminal investigation into these diversions. As I explained to Mr. in an email, the criminal statute of limitations was five years and that any prosecution that would result from an investigation would be time barred and, therefore, a criminal investigation, was not appropriate in 2007.

22. I researched the numerous emails that Mr. Castillo issued during this case and determined that the first time Mr. Castillo claimed that the NYRO should start a criminal investigation was in or about January 2007. However, Mr. Castillo's call for a criminal investigation at that time was based on the Trustees' alleged failure to transfer all of the Annuity Fund's assets to New York Life. Mr. Castillo's subsequent emails request that a criminal investigation be started on the discrepancies between the amount of employer contributions received by the Annuity Fund which is the third issue in phase two of the case. Based on my review of Mr. Castillo's emails and my own independent recollection, it was not until 2008 that Mr. Castillo requested that the NYRO commence a criminal investigation of the Trustees' alleged failure to allocate the Annuity Fund's earnings that accrued during the year 2000.
23. Notwithstanding Mr. Castillo's requests, there was insufficient evidence to start a criminal investigation on any of these issues. In fact, it was by no means clear that there was sufficient proof to establish that the transactions violated the civil provisions of ERISA. And as the recently-issued report by the Office of the Chief Accountant found, there is no merit to issues one and two of phase two of the investigation. Additionally, upon review of additional documentation that was never obtained during the investigation, the NYRO has determined that there is no merit to the remaining two issues in phase two of the investigation. Thus, it would not have been appropriate to start a criminal investigation.
24. Prior to entering private practice, Sherwin Kaplan was the Deputy Associate Solicitor for the DOL's Plan Benefits Security Division located in Washington, DC. I first became aware of Mr. Kaplan in 1996. Since that time I have spoken with him about six times. I do not believe that I ever spoke with him with regard to the Local 12 case, although I did review correspondence that he issued on behalf of his client, Schulteis and Panetierri. I have never had a social relationship with Mr. Kaplan and my limited professional relationship with him has in no way influenced my conduct in the Local 12 cases.



25. I have discussed the Local 12 cases with my wife, Patricia Rodenhausen. However, this personal relationship has in no way influenced me to undermine, hinder or delay the resolution of Mr. Castillo's investigative findings.
26. Mr. Castillo's annual performance rating for FY 2007 was "Effective." For FY 2008, his rating improved to "Highly Effective." I was the reviewing official for both ratings.
27. Mr. Castillo applied, but was not selected, for a position as a Senior Investigator in 2004, 2006 (two times), 2007 and 2008. My predecessor Francis C. Clisham was the regional director and selecting official for the 2004 selection. I was the selecting official for the subsequent selections. Mr. Castillo appealed his non-selection the first three times alleging that he was not selected because he was discriminated against based on age and, subsequently, in retaliation for filing the age discrimination complaint. The DOL and the EEOC found that there was no merit to Mr. Castillo's in all three appeals.
28. When Mr. Castillo applied for the Senior Investigator position he was one of several minorities to apply. The other minority applicants were Dorothea Pinnock (f/n/a Dorothea Harrell) who is African American and Irma Alvarez and Ivette Morgan, who are Hispanic. Ms. Pinnock, Ms. Alvarez and Ms. Maddi were not selected for Senior Investigator positions. However, I was the selecting official, as acting regional director, when Ms. Pinnock and Ms. Alvarez were initially hired. I also was the selecting official, as acting regional director, when Mr. Castillo was initially hired as an auditor. During my tenure as regional director, over the past 3 1/2 years, I have selected the following minorities as investigators: David English, Shenice Franklin, Jerel Johnson and Cassandra Labbees, all of whom are African American, Melanie Munoz, who is Hispanic, and Anthony Tang, who is Asian American.
29. I have taken no action to undermine, hinder or delay the resolution of Mr. Castillo's investigative findings in the Local 12 case. In fact, despite my misgivings about the soundness of his investigative findings, I forwarded such findings, in their entirety, to the New York Solicitor's Office for review and possible litigation. As the regional director I had the authority to decide that the investigation lacked merit and close the case without further action. I did not do so.

Statement of JONATHAN KAY Date: 4/9/09

4/9/09 JK

I have read this statement consisting of 9 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 9<sup>th</sup> day of April, 2009.

Jonathan Kay  
Deponent's Signature

Subscribed and sworn before:

R. D. Dyle  
Special Agent  
4/9/09  
Date

Witnessed by: [Signature] Case Number: 14-2601-0004-IA

Title: ADG

OIG 118C (OLRFI 9/05)

9 JK

**10**

# Report of Interview

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



OIG Form 103 (OI-6/08)

Subject:	Nichelle Langone	Prepared By:	Robert W. Wyche RW	Date Prepared:	March 20, 2009
Interview Date:	March 11, 2009	Location:	33 Whitehall Street, New York, New York	Case Number:	12-2601-0004 IA

On March 11, 2009, Assistant Inspector General (AIG) Asa Cunningham and I interviewed Nichelle Langone, Group Supervisor, 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: Nichelle A. Langone

DOB:

Home

Address:

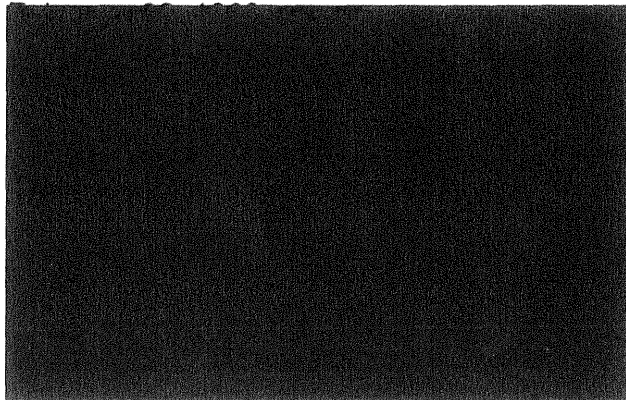
Home

Telephone:

Work

Telephone:

EOD:



Ms. Langone was given a Garity warning at the onset of the interview, which she read and signed, agreeing to answer questions in this investigation. Ms. Langone was questioned regarding her responsibilities as a supervisory investigator and her supervision of Jose Castillo, Investigator, EBSA, New York RO, DOL. Ms. Langone advised that in February 2006 she was given the assignment of acting supervisor and replaced Robert Goldberg, (then acting supervisor) EBSA, New York RO, DOL. Ms. Langone reported that during this time period, EBSA New York Regional Director Jonathan 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 the open position of supervisory investigator.

According to Ms. Langone, this was the first time she had been placed in a supervisory position over Mr. Castillo. Prior to this, she and Mr. Castillo had worked on the same track when Mr. Castillo was hired with EBSA and were under the immediate supervision of

Jonathan Brown, Group Supervisor, EBSA, New York RO, DOL. Ms. Langone could not recall working any investigations jointly with Mr. Castillo during this time period. 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 investigations.

Ms. Langone reported she immediately noticed Mr. Castillo's resistance to her as his supervisor. In her attempts to familiarize herself with Mr. Castillo's other investigations, she would often get the reply from Mr. Castillo that Mr. Goldberg is already familiar with his investigations. Eventually, Ms. Langone gained the trust of Mr. Castillo and he began discussing his investigations with her and gradually accepting her as his supervisor.

Ms. Langone remained separated from the Asbestos Workers Local 12 Funds investigation, only to be informed periodically by Regional Director Kay that Mr. Castillo would need to devote more of his time during various stages of the Asbestos Workers Local 12 Funds 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 in EBSA, indicating they had agreed with his interpretation of the scenario he had discussed with them.

During case review meetings, 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 what benefit EBSA managers would gain 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."

Approximately one year ago, 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.

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.
- In the last two and a half years, her track has not had an investigation that required a report of interview. All of these investigations have been settled through a voluntary compliance letter. This has also resulted from a mandate from the New York Regional Office of the Solicitor to resolve cases and obtain settlements through voluntary compliance.

Ms. Langone has prepared Mr. Castillo's Performance Appraisals for fiscal years (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.

Ms. Langone believes that Mr. Castillo has alleged that EBSA management has stalled and interfered with the Asbestos Workers Local 12 Funds investigation because EBSA management and others have challenged and questioned Mr. Castillo's investigative findings. Ms. Langone is of the opinion that Mr. Castillo feels offended that others have not accepted his investigative findings.

At the conclusion of this interview, Ms. Langone provided a signed sworn written statement.

AFFIDAVIT

City: new YORK Date: 3/13/2009

State: New York Time: 9:50am

Nichelle A+ Langne, being duly sworn, deposes and states:

3/13/09 (N)

Case Number: 14-2601-0001 <sup>JA</sup> Page 1 of 2 Deponent's Initials (N)

OIG 118A (OLRFI 9/05)

3/13/09 (N)



This statement is in response to questioning by GENE CUNNINGHAM, Assistant Inspector General, and ROBERT W. WYCHE, Assistant Special Agent In Charge, from the Office of Inspections and Special Investigations concerning Employee Benefits Security Administration (EBSA) Investigator JOSE CASTILLO and his allegations against EBSA Supervisors.

1. My name is NICHELLE ALT LANGONE and I am a Supervisory Investigator with EBSA. I began my employment with EBSA in November 1997 as an Investigator (GS-09). I was promoted to a Senior Investigator (GS-13) in early 2002. I was promoted to my current position in October 2006. Prior to the permanent promotion of Supervisory Investigator, I was an Acting Supervisory Investigator during the period of February 2006 through June 2006.
2. Prior to 2006, MR. CASTILLO and I were on the same track and shared the same supervisor for a short period of time; however, I do not recall the exact period of time. I was switched to a different track and supervisor in early 2001. I do not believe that MR. CASTILLO and I ever worked together on any joint cases during the time that we were on the same track.
3. The first time I recall working with MR. CASTILLO was during my capacity as Acting Supervisory Investigator. I was succeeding ROBERT GOLDBERG who was Acting Supervisory Investigator for the period October 2005 through February 2006. At some time immediately before or simultaneously with the transition, I was notified that MR. GOLDBERG would remain as the Supervisor on the Local 12 cases. The decision was based on several factors. I remember two in particular. One, MR. GOLDBERG had already attended several meetings related to the cases – both internally and with outside parties. And two, the cases involved complex accounting issues. As MR. GOLDBERG has an accounting background and I do not, the decision seemed like an easy one.
4. MR. GOLDBERG and I agreed to have joint meetings with the investigators on the track so that the transition would be as smooth as possible. It was during this meeting where I first noticed MR. CASTILLO'S resistance towards my supervision. First, he would not answer my questions directly as I was looking for information to familiarize myself with his cases. For example, he responded by saying something similar to "Bob and I are taking care of that" or "Bob and I discussed that already." Second, he would not look at me when he spoke; he directed his answers to MR. GOLDBERG only. And third, he had apparently developed a good relationship with MR. GOLDBERG and was not happy about working with a new Supervisor. I was able to gradually build his trust and we have a workable relationship.
5. With regard to the Local 12 cases, I have little or no involvement. My association with the cases stemmed from either his or the REGIONAL DIRECTOR'S notification to me that MR. CASTILLO would be spending considerable time on the cases during their various stages. This was important information to me as a Supervisor as I have to shuffle the caseload of my track as well as that of MR. CASTILLO.
6. From time to time MR. CASTILLO would provide me with scenarios and ask for my opinion. This was generally done in conjunction with scheduled case reviews

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na)

or impromptu meetings on other cases. Over time, I realized that he was asking pointed questions about the Local 12 cases. MR. CASTILLO mentioned that he posed the scenarios to other investigators, particularly accounts/CPAs, to elicit their opinion based upon the facts as he provided them. Additionally, MR. CASTILLO would sometimes mention new information that was discovered during the course of the Local 12 investigation. I provided very little feedback as I was unfamiliar with all the facts of the case.

7. At some point, it came to my attention that MR. CASTILLO believed that no one supported his findings and that management was deliberately trying to destroy his cases. I asked him what the benefit would be to the NYRO or to EBSA. His response was usually "I don't know" or "that's the million dollar question."
8. With regard to MR. CASTILLO'S caseload, he generally maintains a similar number of cases in comparison to his co-workers. During the period in which he was spending significant investigative time on the Local 12 cases, I did not assign him any new cases and his then current inventory sat stagnant for that period.
9. I have not assigned any criminal cases to MR. CASTILLO. I am not sure if he has ever conducted a criminal investigation while under other supervision. Most criminal cases are assigned to the investigators that have developed liaisons with other law enforcement agencies on prior cases. However, some cases are assigned directly by supervision. MR. CASTILLO has never requested a criminal case assignment. I believe that the demands of a criminal case investigation are outside the comfort zone of MR. CASTILLO.
10. Approximately nine or twelve months ago MR. CASTILLO mentioned to me that he thought the Local 12 cases should be presented to a prosecutor for criminal investigation. Having some experience with criminal cases, I asked him some pertinent questions. For example, the dates of the alleged criminal acts. From his responses, it appeared that the statute control date (SCD) had passed. Also, I explained to him that even had the SCD not been an issue, the case was complex and it didn't seem like the type of case one could easily convince a prosecutor to pursue.
11. As MR. CASTILLO'S Supervisor, I prepared his Performance Appraisals for 2007 and 2008. His rating in 2007 was Effective. His rating in 2008 was Highly Effective. In 2008, MR. CASTILLO'S litigation cases required some attention that was unique to the case. For example, he was required to answer interrogatories and he was deposed. In addition to his own deposition, he assisted NYRSOL in preparing for the depositions of the multiple defendants. It was my understanding that his actions were instrumental for the resolution of the case. Consequently, his Performance Appraisal reflected this.
12. It is my belief that MR. CASTILLO is making his allegations because management challenged his findings on the Local 12 cases. I believe that the challenge hurt MR. CASTILLO'S pride. For example, under the supervision of his former Supervisor, MR. CASTILLO developed a history of working Taft-Hartley (Union) cases. It is my understanding that he and his supervisor had a high success rate and his ability to conduct such investigations was never questioned. Here, he had the opposite experience and I believe it offended him. These are my personal beliefs.

3/13/09  
HLD

Statement of Nichelle FitzLangone Date: 3/13/09

3/13/09 (24)

I have read this statement consisting of 4 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 13 day of MARCH, 2009

Nichelle FitzLangone  
Deponent's Signature

Subscribed and sworn before:

R. D. V. [Signature]  
Special Agent  
3/13/09  
Date

Witnessed by: [Signature] Case Number: 14-2601-0004 IA

Title: ATG

OIG 118C (OLRFI 9/05)

3/13/09

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# Report of Interview

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



OIG Form 103 (OI-6/08)

<b>Interview Date:</b>	May 5, 2009	<b>Location:</b>	Telephonic Interview	<b>Case Number:</b>	14-2601-0004 IA
<b>Subject:</b>	Jeffrey Gaynor	<b>Prepared By:</b>	Robert W. Wyche <i>rw</i>	<b>Date Prepared:</b>	May 5, 2009

On May 5, 2009, I telephonically interviewed Jeffrey Gaynor (201/497-8109), former Deputy Director (retired) Employee Benefits Security Administration (EBSA), New York Regional Office (RO), United States Department of Labor (DOL).

After explaining the nature of the investigation, Mr. Gaynor was asked if he could provide information regarding his association with the Asbestos Workers Local 12 Funds investigation and Mr. Castillo.

Mr. Gaynor confirmed he had held the position of Deputy Director at EBSA New York RO and had retired 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.

Mr. Gaynor was unable to provide any additional information regarding the allegations made by Mr. Castillo towards him or any other EBSA employees.