State of New York
Office of the Inspector General

Investigation of Compensation Awarded to the Chairman of the Long Island Power Authority in 2006

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INTRODUCTION

On June 21, 2007, Governor Eliot Spitzer requested that the Office of the State Inspector General (Inspector General) inquire into whether or not Richard Kessel had acted properly in accepting compensation while serving as full-time Chairman of the Long Island Power Authority (LIPA) during calendar year 2006. The issue arose upon the appointment in January 2007 by Governor Spitzer of Kevin Law as Chairman of LIPA, succeeding Kessel. Kessel remained at LIPA until October 2007 as Chief Executive Officer (CEO) to assist Law with his transition. Kessel informed Law that he, Kessel, had been compensated while serving as Chairman, and advised Law that he could be paid in this role as well. Law, in turn, contacted the Governor's office to confirm Kessel's information. After a brief review of the issue, the Governor's office contacted the Inspector General to inquire into the matter.

LIPA, which distributes power in Long Island, was created in 1986 in an effort to control electricity costs on Long Island. LIPA's authorizing statute provides for a board of fifteen unpaid trustees, one of whom is selected by the Governor to act as Chairman. It also permits the Board of Trustees to employ and compensate any employees necessary to accomplish its mission.

Between 1997 and January 2006, Kessel served as Chairman of the Board, President and Chief Executive Officer of LIPA. Kessel received a single salary while employed by LIPA, earning $204,932 in salary and bonuses in 2006. In January 2006, Governor George Pataki signed the Public Authorities Accountability Act, which was designed to reform the operation of the state's public authorities. Among other provisions, the act required all public authorities to separate the roles of board members and executive officers. Accordingly, board members, including chairmen, were now prohibited from acting as chief executive officers or any other equivalent position. Its provisions were effective immediately. To comply with the law, Kessel resigned his positions of CEO and President of LIPA on January 18, 2006, and retained the title of Chairman of LIPA's Board of Trustees. Despite his official resignation as CEO and President, Kessel continued to fulfill all the same duties he had prior to his resignation.

The Inspector General's investigation was directed at the issue of Kessel's compensation as Chairman of LIPA in 2006, and whether Kessel engaged in misconduct in obtaining or accepting such a salary. In the course of this investigation, the Inspector General's office interviewed Kessel and other officials at LIPA, as well as several high-ranking officials of former Governor Pataki's administration. Governor Pataki confirmed Kessel's account of their conversations through counsel. In addition, numerous records pertaining to this matter were reviewed.

The Inspector General found that Kessel acted reasonably in believing that he was legally entitled to receive compensation for his duties as Chairman of LIPA during the calendar year of 2006. Kessel did not act surreptitiously in obtaining a salary nor do so unilaterally. Kessel personally informed Governor Pataki and Secretary to the Governor John Cahill that, in the opinion of some, the Public Authorities Law prohibited the LIPA Chairman from receiving a salary. However, the Governor requested that Kessel remain as Chairman, and Cahill informed Kessel that he could continue receiving a salary in this position.

There is no question that Kessel worked full time during 2006 managing LIPA. Nor is there any suggestion that Kessel's salary was excessive given the work he performed. Based on the Governor's request for Kessel to continue at LIPA as Chairman, it would have been unreasonable to expect Kessel to perform as he did uncompensated.

Although LIPA's authorizing statute states that its "trustees" are unpaid, based on the legal opinions he received and assurances from Governor Pataki's office, Kessel reasonably could have believed that the statute permitted a full-time Chairman with his responsibilities to receive compensation, as Kessel's duties greatly exceeded those of a part-time trustee. One such written opinion to this effect was received from an attorney under contract with LIPA in January 2006, and a second written opinion was received on December 12, 2006 from a separate firm under contract with LIPA. Both opinions reported that the law could be interpreted to allow LIPA's chair to receive compensation in such role. Additionally, a former public official, who had been responsible for public authorities under Governor Pataki, concurred. LIPA's Board, which is authorized to compensate employees in carrying out its mission, was informed by Kessel of his resignation as Chief Executive Officer and continued Kessel's salary.

THE INVESTIGATION

Legislative History of the Long Island Power Authority

LIPA is a non-profit public utility employing approximately 100 employees to distribute power to Nassau and Suffolk counties. At present it is Long Island's primary electric service provider. LIPA contracts with private utility National Grid, which generates the power that LIPA distributes.

LIPA was created in 1986 pursuant to a provision of the New York State Public Authorities Law. Section 1020-d of the law provided that LIPA be governed by a board of nine trustees. Five of the trustees were to be appointed by the Governor, one of whom the Governor would designate as Chairman. The law further provided:

> The trustee appointed as chairman as provided in this section shall receive an annual salary . . . Each other trustee shall receive no salary but shall be entitled to reimbursement for reasonable expenses in the performance of duties . . . .

In August 1995, Governor George Pataki signed amendments, currently in effect, to the Public Authorities Law. The 1995 amendments expanded the LIPA Board to 15 trustees, "one of whom the governor shall designate as chairman, and serve at his pleasure." In addition, the revised law repealed the section specifically authorizing LIPA's Chairman to receive a salary and replaced it with language stating that "no trustee shall receive a salary."[1]

On January 13, 2006, Governor Pataki signed the Public Authorities Accountability Act of 2005. The act had grown out of recommendations from the Public Authority Governance Advisory Committee, also known as the "Millstein Commission." The committee was charged with developing model governance principles for public authorities, and was formed in response to management abuses by some of the state's public authorities. It was intended to increase oversight and transparency of the state's authorities and applied to all public authorities, including LIPA. Among other provisions, the statute separated the duties of an authority's board from its executive staff with a new section that stated:

[1] In the same bill that repealed the section of LIPA's statute affording the chairman compensation, the Legislature amended the New York Power Authority's (NYPA) statute specifically allowing its chairman to receive a salary so long as he or she held no other NYPA position.

> No board member, including the chairperson, shall serve as a public authority's chief executive officer, executive director, chief financial officer, comptroller, or hold any other equivalent position while also serving as a member of the board.

According to Senator Vincent L. Leibell's memorandum in support of the act, this provision was based on a recommendation from the Millstein Commission that authorities should employ a "separation of oversight and executive functions."

Kessel's Tenure at LIPA

From 1989 to 1995, Kessel served as paid Chairman of the LIPA Board of Trustees. In 1995, Governor Pataki, using the then-new authority of a revised LIPA statute, removed Kessel as Chairman. In April 1997, however, Governor Pataki re-appointed Kessel as Chairman, and later in 1997 Kessel also was named LIPA's Chief Executive Officer at an annual salary of $88,000. Kessel retained both titles until January 18, 2006, when he resigned as Chief Executive Officer to comply with the provision of the Public Authorities Accountability Act prohibiting a board member from acting as the chief executive.

Kessel continued as Chairman until January 2007, when Governor Spitzer announced the appointment of Kevin Law to replace Kessel as Chairman of LIPA. Kessel remained at LIPA as Chief Executive Officer until he resigned that position in October 2007. During the year 2006, in which Kessel held the position of Chairman alone, Kessel earned $204,932, including bonus.[2]

[2] By comparison, the *Watertown Daily Times* reported on June 24, 2008, that the Chairman of the New York Power Authority earns $90,800 annually, and the President/Chief Executive Officer position pays $259,000. *Forbes* magazine reported that Kevin Burke, Chairman and CEO of Consolidated Edison, earned $5.5 million in 2007 (http://www.forbes.com/finance/mktguideapps/personinfo/FromPersonIdPersonTearsheet.jhtml?passedPersonId=906866).

LIPA's Objections to the Public Authorities Accountability Act

As early as 2004, the Governor's office requested the state's public authorities to comment on the proposed Public Authorities Accountability Act, which in its draft form included the provision to separate the duties of the board and the executive staff. Kessel signed a May 13, 2004, letter to John Cahill objecting to the proposed legislation on several grounds. Specifically, the letter noted that LIPA supported the proposed separation of the Chair and Chief Executive Officer positions, but that "the LIPA Act does not allow for compensation of the chair." The letter went on to suggest that the bill be amended to allow the LIPA Chairman to be compensated.

In February 2005, the Governor's Office again solicited comments from public authorities on the proposed legislation. LIPA again responded, under Kessel's signature, in a letter to Richard Platkin, then-Counsel to the Governor. This response again stated that "the LIPA Act currently does not provide for the compensation of trustees, including the position of chair" and advocated for changes to the proposed bill. A legislative proposal specifying that the LIPA Chairman could be compensated was attached.

When asked about these letters, Kessel told the Inspector General's office that LIPA's General Counsel Stanley Klimberg had authored the letters and presented them to Kessel for his signature. Kessel acknowledged that the letters were forwarded under his name, but stated that he had not reviewed the LIPA statute nor formed an opinion at that time regarding LIPA's authority to compensate its Chairman. Regarding the two letters Kessel signed stating that LIPA's authorizing statute did not allow for compensation of its Chairman, Kessel stated, "I don't agree with that. That was Stan's position it was not necessarily mine. But he felt it was important if the statute could be amended to have, where it clearly says that the Chairman can be compensated that that was better, and I agreed with that."

Kessel also indicated to the Inspector General's office that he did not fully support the separation of Chairman and Chief Executive Officer, as was stated in the 2004 letter. Kessel noted that most private utilities have a single Chairman and Chief Executive Officer.

The Legislature passed the Public Authorities Accountability Act in June 2005, without the amendments proposed by LIPA. On July 6, 2005, Klimberg submitted objections to the bill, addressed to Platkin, repeating the concerns previously expressed by Kessel's letters to the Governor's Office. Klimberg wrote:

> The proposed requirement for separation of the positions of Chairman and CEO, which LIPA plans to implement, would be problematic for LIPA unless either this bill or LIPA's enabling statute were amended to provide compensation to the Chairman. LIPA's enabling statute does not currently provide for the compensation of LIPA's Chairman, which is a full time position at LIPA.

Klimberg reiterated later in the memorandum:

> With respect to the separation of the positions of Chairman and CEO, LIPA's enabling statute currently does not provide for the compensation of the position of Chairman. Given the level of oversight responsibility expected, the size and scope of LIPA's operations and the need for a qualified and experienced individual to serve as Chairman, compensation should be provided for the individual serving as Chairman on a full time basis.

Klimberg told the Inspector General's office that it was his position that the Chairman should be compensated, but the statute did not permit it. Klimberg stated that Kessel disagreed, believing that LIPA's statute permitted the Chairman to be compensated.

LIPA continued to press for changes in the legislation to address the issue of the Chairman's compensation. Based on discussions with the Governor's office, Klimberg submitted the proposals in an October 20, 2005 memorandum addressed to Platkin. Kessel stated that he "may have" approved Klimberg's submission. According to Klimberg, the Governor's office did not respond. On January 13, 2006, Governor Pataki signed the Public Authorities Accountability Act into law, effective on that date. No legislative amendments were made to LIPA's statute regarding compensation of LIPA's Chairman.

Kessel Examines the LIPA Statute and Obtains Legal Opinions

Sometime after the Legislature passed the Public Authorities Accountability Act but before it was signed by the Governor, Kessel requested a copy of LIPA's statute from Klimberg. Later that day, Kessel returned to Klimberg's office and informed Klimberg that he disagreed that the law prohibited the Chairman from receiving compensation. Kessel stated that he asked Klimberg to show him where the statute prohibited compensation for the Chairman. Klimberg directed Kessel to the statement, "No trustee shall receive a salary." Kessel told Klimberg he disagreed with Klimberg's interpretation that this sentence prohibited the Chairman from receiving compensation, because the Chairman is different from the other trustees.

Kessel explained his reasoning to the Inspector General:

> I don't go to LIPA once a month to preside over a Board meeting, I work twenty-four hours a day, seven days a week, to keep the lights on during storms, blackouts, everything. . . I'm not just a trustee sitting there voting.

Kessel also stated that around this time he spoke with two outside attorneys to obtain their opinions as to whether the LIPA Chairman could receive a salary. Kessel spoke with Arthur J. Kremer of the firm Ruskin Moscou Faltishek, which had a long-time contract relationship with LIPA. Kremer is a former Assembly member of 23 years who was involved in the drafting of LIPA's current statute. Kremer also has represented LIPA on multiple occasions before the New York State Court of Appeals.

Kessel said that he spoke with Kremer prior to his meeting with Governor Pataki, and Kremer told him:

> 'If you're the Chairman, and there is no CEO. . . that's very clear that you can be paid.' He said now, he says he believes, and this is way before the law was passed, this was in the fall… And he believed that the Chairman of LIPA could be paid based upon the statute, but he also told me that if there's no CEO in there, that made it much clearer.

Kremer acknowledged to the Inspector General that he had spoken with Kessel two or three times prior to the enactment of the Public Authorities Accountability Act in January 2006, and had advised him that, in his view, the LIPA statute did not prohibit a full-time Chairman from being compensated.

In addition, Kessel stated that he discussed the matter with Louis Tomson, Deputy Secretary for Public Authorities to Governor Pataki from 1995 to 1999, who also told Kessel that the Chairman of LIPA was not prohibited from obtaining compensation. Kessel stated the following about his conversation with Tomson:

> He felt that I could be compensated. He felt that the statute was vague, that it didn't – you know, that, again, this is his opinion, and you know, he said that – the notion that, and by the way he helped write that statute, so he would know better than anyone, that the notion that a trustee shouldn't be paid was in his or her performance as a trustee. I was not performing as a trustee.

When contacted by the Inspector General's office, Tomson confirmed Kessel's accounts of their discussions concerning Kessel's compensation. Tomson stated that he was friendly with Kessel, since the two had worked together in the past, and that he had spoken to Kessel approximately three to five times on the topic. Tomson also stated that he might have been involved in drafting LIPA's statute in 1995, and that he had reviewed the LIPA statute again after speaking with Kessel. Although he had not performed any additional research, he confirmed that he told Kessel informally that he thought the LIPA statute was unclear regarding compensation of the Chairman. He stated he thought it was fair for Kessel to be compensated, particularly since he was only drawing a single salary.

Kremer told the Inspector General that Klimberg called him to request a written opinion in January 2006, shortly before the next Board meeting. Kremer said that, although he was presented with a very short time frame, he spoke with two attorneys on the Assembly's Central Staff[3] and two attorneys from the office of Assemblyman Richard Brodsky, Chairman of the Assembly Committee on Corporations, Authorities and Commissions. Kremer stated that, while he could not recall the names of any of the attorneys he spoke with, none advised him that Kessel would be prohibited from receiving compensation as Chairman. Kremer stated that he was told that the issue of compensation for the Chairman was a "grey" area. Kremer stated that he believed that LIPA intended to distribute his opinion at its next Board meeting on January 26, 2006.

[3] According to Kremer, the Assembly Central Staff exists to serve as screeners for legislation coming into or out of the Assembly, and to serve as legal advisors to all committees, particularly those without their own counsel.

Kremer sent Kessel a letter dated January 19, 2006 consisting of a conclusory opinion. Kremer's opinion reads, in full:

> After reviewing the provisions of the Public Authorities Law as they pertain to the Long Island Power Authority, it is our view that you may be compensated for your duties as full-time Chairman of said Authority.

Klimberg stated that he does not recall personally requesting the written opinion from Kremer, and further stated that he did not receive a copy of Kremer's letter to Kessel. Klimberg told the Inspector General's Office that he did not see Kremer's letter until nine months later. It does not appear that Kremer's letter was distributed at the next Board meeting.

Kessel Discusses Compensation and his LIPA Role with the Governor's Office

In late 2005, prior to Governor Pataki signing the Public Authorities Accountability Act into law, Kessel discussed his situation at LIPA with Governor Pataki and other officials from the Governor's office. According to Kessel, when he informed the Governor that he would have to resign one of his positions, and that he understood that the Chairman position was uncompensated, Governor Pataki responded, "I want you to stay as Chairman of the Board. You report to me, I appoint the Chairman. In terms of the issue of compensation, talk to John [Cahill] about it."

When asked why he did not resign his Chairman position and remain in the salaried position of Chief Executive Officer Kessel responded, "The Governor did not ask me to be the CEO of LIPA. He said, 'I want you to be the Chairman, and I want you to run LIPA.' "

Subsequently, Kessel stated that he had discussions with then-Secretary to the Governor John Cahill, then-Deputy Secretary for Energy and the Environment Charles Fox, and then-Deputy Secretary for Authorities Adam Barsky. Kessel's account of one of these meetings is as follows:

> It was at a meeting in the city, and he [Cahill] told me that they looked at it, and they wanted me to stay as Chairman, and they didn't see any problem with me being compensated as Chairman…. They communicated on several occasions to me that they were comfortable, and had no problem. They wanted me to stay as Chairman and be compensated as Chairman if they signed the bill…. I remember Adam [Barsky] saying to me, "there's no issue about you being paid if you're Chairman, you can be paid."

Later in his interview with the Inspector General's office, Kessel again recalled discussions with Cahill, Fox, and Barsky. He reiterated that he was told by the officials that, "the Governor wants you to stay as Chairman of LIPA, and you can be compensated." According to Kessel, the three officials all said that they had "no problem" with Kessel receiving compensation as Chairman, and that Barsky stated that there was "no issue as to whether or not you're being paid as far as we're concerned."

LIPA's Chief Financial Officer, Elizabeth McCarthy was interviewed by the Inspector General's office and stated that she attended a meeting including Cahill, Fox, and Barsky. McCarthy recalled that at the end of the meeting, she left the room and waited approximately 45 minutes for Kessel to exit the meeting. According to McCarthy, when Kessel appeared he informed her that he had been told he could remain as Chairman and be compensated.

Although Kessel was adamant that he was told that the Governor's office had "looked at" the issue of his compensation before assuring him he should go forward, the

Inspector General could not identify any individual on the Governor's legal staff who had reviewed the matter. Fox, Barsky, and Cahill all told the Inspector General's office that they believed someone in the counsel's office had looked at it, but none had seen a memo on the topic or spoken to anyone in the counsel's office about it.

Fox, when interviewed by the Inspector General's Office, stated he had been responsible for the coordination of energy policies among New York State agencies and authorities, including LIPA. Fox stated that he was not involved in the Millstein Commission nor its recommendations related to management of public authorities. Fox did not recall a meeting in which he or anyone else from the Governor's staff told Kessel he should stay on as Chairman and be compensated, but Fox also stated that it was not a substantive issue for him – he was not "focused on it." Fox stated that Barsky and Deputy Counsel to the Governor W. Brooks DeBow[4] were working with LIPA on these governance issues. However, Fox did report that Kessel was a very hands-on manager and that Fox dealt with Kessel directly when he needed to get something done at LIPA. Fox stated that the accountability act "wasn't a big deal" to him; he just knew Kessel as the guy who ran LIPA. In fact, Fox said that the felt that Kessel was underpaid.

Unlike Fox, Barsky said that he had worked with the Millstein Commission and recalled that the issue of Kessel's dual position and his compensation as Chairman did arise. Barsky said that he supported the separation of the roles of Chairman and CEO and recalled the issues faced by LIPA, but emphasized that that decisions regarding Kessel's role and compensation were appropriately decided by LIPA's Board. According to Barsky, Kessel was the full-time Chairman and wore various hats at LIPA. When the

[4] On June 30, 2006, DeBow was appointed by Governor Pataki to the New York Court of Claims.

issue came up with Barsky, he responded that Kessel could choose to remain as Chairman, or become the CEO. He could not perform both roles. According to Barsky, the issue then became whether or not Kessel could remain as Chairman and get paid. Barsky stated that “our advice to them” was that this was an issue to be resolved at LIPA by the organization’s Board and with a legal opinion. Barsky said that he had no recollection of telling Kessel he could remain as Chairman and had no specific recollection of the meeting Kessel described to the Inspector General’s office.

Despite Barsky’s emphasis on LIPA’s responsibility for its own governance decisions, Barsky stated that he had seen Kremer’s written opinion and believed that Deputy Counsel DeBow, who was responsible for matters involving public authorities, had seen the opinion and did not “take issue” with it. Barsky said there was a “feeling” at the Governor’s office that no one could claim that the LIPA Chairman was just another trustee based on the amount of work he did. Barsky also stated that there was widespread agreement in the Governor’s office that it made sense for Kessel to continue as Chairman rather than CEO, as Kessel’s strengths were more strategic and more oriented towards policy and public relations.

Although both Barsky and Fox told the Inspector General’s office that DeBow had reviewed the issue, DeBow stated that he was never asked to review any legal issue relating to Kessel’s compensation at LIPA and did not do so. According to DeBow, he “would have looked at critically” any LIPA matter brought to his attention because he considered LIPA a “lightning rod” for controversy. DeBow further stated that he had never seen Kremer’s written opinion prior to his interview with the Inspector General’s office. In discussing Kremer’s written opinion, DeBow stated that the opinion’s brevity would have raised a "red flag." DeBow further stated that any request to the counsel's office for an opinion regarding LIPA would have been referred to him.

The Inspector General's office also interviewed Robert Ryan, formerly an attorney in the Governor's counsel's office with responsibilities relating to the Public Authorities Accountability Act. Ryan also stated that he was never asked to review the issue of compensation for LIPA's Chairman.

When informed that the accounts of the Governor's staff members differed from his own, Kessel suggested that the others might have forgotten because the issue of his compensation as Chairman was always only one topic among many that were discussed in his meetings with these officials, and that other, larger issues were the focus of everyone's attention, such as a National Grid move to take over KeySpan. The Inspector General has no difficulty recognizing that Kessel, to whom compensation was an issue requiring timely resolution, would remember the details of conversations that were not particularly important to others at the time. The Inspector General found all these witnesses credible and forthright during their interviews and has no evidence to suggest that any witness was intentionally untruthful.

Unlike the other Governor's staff members, Cahill confirmed that he told Kessel that the Governor wanted Kessel to remain as Chairman, and to be compensated as long as there were no legal impediments. Cahill stated that Kessel is the one who informed him that the legal issues regarding compensation for the Chairman had been resolved. Cahill, like Barsky and Fox, said that he believed that the Governor's counsel's office had reviewed the matter, but acknowledged that he did not speak to anyone in the counsel's office. Cahill further stated that he did not press Kessel for details regarding

Kessel's examination of the matter. Kessel stated that he could not recall, but he may have informed Cahill of the assurances he received from Kremer and Tomson that the LIPA statute did not prohibit him from receiving compensation as Chairman. Neither Cahill nor Kessel said that Cahill had been given the written opinion Kessel obtained from Kremer.

Cahill also told the Inspector General that he told Kessel that Kessel should be paid because he worked hard. Cahill said he felt comfortable having Kessel remain as Chairman and never told Kessel to change what he was doing. Cahill said he felt there would be no way to find a qualified CEO to run LIPA with such a short period remaining in Governor Pataki's last term of office.

Kessel Resigns as LIPA CEO, But Remains as Chairman and Obtains Additional Outside Legal Opinion on Compensation

To comply with the provision of the Public Authorities Accountability Act that prohibits an authority chairman from also serving as its chief executive officer, Kessel resigned as LIPA President and Chief Executive Officer shortly after Governor Pataki signed the act into law. Kessel advised LIPA Board Secretary Kathleen Stella of his resignation, effective immediately, in a January 18, 2006, memorandum that was copied to Klimberg and LIPA Chief of Staff Edward Grilli.

Stella told the Inspector General's Office that she did not distribute copies of the memorandum to Board members. Stella said that Klimberg gave her the memo for her files, and that it was not her practice to distribute staff resignations to the Board.

The LIPA Board held its scheduled monthly meeting on January 26, 2006. The 48-page meeting minutes make no mention of Kessel's resignation. However, Kessel told the Inspector General's office that he informed Board members in a closed executive session that he was resigning as Chief Executive Officer but continuing as Chairman. While no minutes were taken of the executive session, Klimberg and McCarthy confirmed Kessel's account. Kessel stated that he raised the issue in the closed executive session because it was the practice of the Board to discuss compensation matters in a closed session. Former Board member Nancy Akeson advised the Inspector General that Kessel's resignation was no secret, but rather "so transparent." She stated that she and the Board were comfortable compensating Kessel as Chairman because lawyers had reviewed the matter and were of the opinion that he could be compensated as such, and because of his importance in the day-to-day operation of LIPA.

In the executive session Kessel also requested that Akeson lead a search committee for a new LIPA Chief Executive Officer. The search for a new Chief Executive Officer was unsuccessful. Akeson explained that there remained less than a year of Governor Pataki's last term, making it difficult time to attract a CEO for a public authority such as LIPA. The search committee met only a few times, and worked to create a job description and qualifications for the new CEO, but did not contact anyone outside of LIPA. Kessel explained that he "pushed" to hire a new Chief Executive Officer, but met with resistance both from inactive Board members and from Governor Pataki's office, which was hesitant to offer the salary Kessel felt was required to hire an energy company executive.

On January 26, 2006, in an article entitled, "Still at LIPA, but not as CEO: New state law kicks Richard Kessel out of post; he'll retain chair," *Newsday* reported that Kessel would give up his CEO position by year's end to comply with the Public

Authorities Accountability Act. The article erroneously reported that the act was not effective until the following January.

A March 9, 2006, LIPA public bond offering stated that Kessel had stepped down as Chief Executive Officer but "will retain overall responsibility for oversight of the authority's strategic direction and operations."

LIPA made no general public announcement of Kessel's resignation. On November 22, 2006, *Newsday* reported that LIPA "disclosed yesterday" that Kessel had resigned his Chief Executive Officer and President posts "10 months ago – without formally announcing it to ratepayers." The article noted that Kessel was listed as LIPA Chief Executive Officer on the authority's Web site into late November. Kessel told the Inspector General's office that it was a mistake for LIPA not to have issued a press release announcing his resignation as Chief Executive Officer at the time it occurred.

The November 22 *Newsday* article also quoted Chairman of the Assembly Committee on Energy Paul Tonko, referring to Kessel's retention of his managerial duties, "Certainly here the spirit of the law is not being complied with in my opinion." Tonko also questioned Kessel's retention of his salary as Chairman. On the other hand, LIPA's current General Counsel Lynda Nicolino told the Inspector General's office that she did not believe that the spirit of the accountability act was violated and emphasized that Kessel was not being doubly compensated.

Also in the fall of 2006, LIPA Board members Patrick Foye and Howard Steinberg contacted Klimberg and expressed concern that Kessel might not be entitled to compensation as Chairman alone. Klimberg told Foye and Steinberg that Kessel believed that the law permitted him to be compensated as Chairman, and told them of the legal opinion LIPA had obtained from Kremer. The two trustees said that they were not satisfied with Kremer's opinion. Following this conversation, Klimberg recommended that LIPA obtain an additional legal opinion regarding Kessel's compensation.

Klimberg then met with Douglas Davison, a partner in the law firm of Thelen Reid Brown Raysman & Steiner, which had worked for LIPA for many years, and had advised LIPA on questions regarding corporate governance in the past.[5] Thelen provided LIPA with a four-page opinion dated December 12, 2006. Thelen concluded, "While we find certain of the various statutory provisions somewhat ambiguous and, therefore, regard the matter as not wholly free from doubt, we believe that for reasons discussed below, LIPA is not prohibited from compensating Mr. Kessel as the Authority's Chairman under applicable New York law." Klimberg stated that although he did not agree with its conclusions he thought that the Thelen opinion was "reasonable."

Kessel's Work During 2006

Throughout 2006, Kessel continued to perform all the same functions as before, lacking only his dual title. He was paid a salary plus bonus totaling $204,932, slightly less than the $209,749 he received the previous year. The Governor's office and the LIPA Board were satisfied with Kessel's performance in managing LIPA. Kessel reportedly worked long hours, and his pay was substantially less than a private energy company executive would receive. In fact, Kessel was paid less than LIPA's other top executives.

[5] LIPA records show that Thelen has a five-year contract with LIPA with an estimated value of $4.5 million. LIPA paid the firm more than $1 million in 2006.

On January 24, 2007, Governor Eliot Spitzer announced the appointment of Kevin Law to replace Kessel as the non-salaried Chairman of LIPA. Kessel became Chief Executive Officer and remained at LIPA until the fall of 2007. On October 15, 2007, Governor Spitzer appointed James L. Larocca as LIPA Chairman, also uncompensated. The same day, the Governor named Law President and Chief Executive Officer of LIPA, earning an annual salary of $295,000.

FINDINGS

Separation of Duties

Although Kessel resigned his position in name effective January 18, 2006, he continued to exercise managerial authority over LIPA while simultaneously serving on the Board throughout 2006. While the clear intent of the Public Authorities Accountability Act was to separate the functions of the Board and the executive staff, LIPA did not abide by this legislative mandate. Kessel acknowledged the effect of the new law to the Board by timely resigning his titular position as CEO, yet LIPA continued to approve Kessel's functional operation of the authority. Although a search committee to recruit a new CEO was established, no meaningful effort was expended.

The Inspector General recognizes the difficulties faced by LIPA and the Governor's office in trying to formulate a new management scheme for the authority so close to the end of the Governor's term. However, the apparent disregard shown by LIPA and the Governor's office for the Public Authorities Accountability Act's intent to separate the positions of the Board and the executives is troubling.

Had Kessel retained the title of CEO rather than Chairman, there would have been no question that he could have been compensated, and Kessel could have managed LIPA's day-to-day operations without running afoul of the Public Authorities Accountability Act. The Governor could then have appointed a new Chairperson from among the remaining trustees, the majority of whom were gubernatorial appointees, to fulfill the remainder of the Chair's term. Instead, the Governor's office directed that Kessel retain the title of Chairman while continuing to run LIPA, despite issues related to both Kessel's compensation and the separation of duties.

Compensation as Chairman

Throughout 2006, Kessel continued to serve as Chairman, as he was directed to do by the Governor, and was compensated as such. There is no allegation that Kessel was compensated for hours he did not work or that his salary was excessive. Although Kessel resigned as Chief Executive Officer, he continued to perform all the same functions as before. The Governor's office and the LIPA Board were satisfied with Kessel's performance in managing LIPA.

As noted, there were conflicting legal interpretations of LIPA's statute regarding the Chairman receiving compensation, and it is beyond the scope of this report and the authority of the Inspector General to attempt to conclusively resolve this legal issue. Rather, this report is directed at determining whether Kessel engaged in misconduct in the process of securing and accepting compensation. The Inspector General finds, upon a review of the evidence, that Kessel engaged in no misconduct and acted reasonably in accepting compensation for his full-time work as Chairman of LIPA. Kessel did not act surreptitiously in obtaining compensation nor do so unilaterally. Kessel relied on the attorneys' opinions he received, in combination with assurances from the Governor's office, in his decisions to continue managing the agency as Chairman, and to receive a salary.