



STATE OF NEW YORK  
EXECUTIVE CHAMBER  
ALBANY 12224

MEMORANDUM

**To:** File  
**From:** Seth H. Agata,  
First Assistant Counsel to the Governor  
**Date:** July 9, 2014  
**Subject:** Post-Employment Ethics  
Rules/Restrictions

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Joseph Percoco has asked whether Public Officers Law (POL) § 74, subd. 8 impacts his post-State employment activities. He has advised me that he has been asked by a law firm to engage in discussions with various labor organizations on local matters pending before local municipalities. In sum: there are no restrictions on his proposed activities. The POL limits the actions of a covered State employee with respect to appearances or matters before State agencies, not local governmental entities. Moreover, the special restrictions on Executive Chamber employees do not apply.

There are three post-employment restrictions on Executive Chamber employees. During the two year period following the termination of their State service, an Executive Chamber employee is prohibited from

receiving compensation for services rendered in connection with any matter before the Executive Chamber and is also prohibited from appearing or practicing before the Executive Chamber or any state agency.

An Executive Chamber employee is further barred for life from working on any of the same cases, proceedings, applications or transactions that the employee worked on during their employment with the Executive Chamber.

- For the two year period following the termination of their state service, an Executive Chamber employee is prohibited from appearing or practicing before the Executive Chamber regardless of whether the employee is compensated for the work. During this two year period, an Executive Chamber employee is also prohibited from receiving compensation for services rendered on behalf of any person, firm, corporation or association in relation to any case, proceeding, application, or other matter before the Executive Chamber. This “receiving compensation for services” bar — which is also referred to as the “backroom services rule” — is broad and prohibits, among other activity, participating in the development of a plan or strategy to influence any decision or action by the Executive Chamber, participating in a telephone call with the Executive Chamber, or instructing or advising a colleague placing a such call.
- For the two year period following the termination of their state service, an Executive Chamber employee is prohibited from appearing or

practicing before any state agency, department, division, board, commission, bureau, public benefit corporation, public authority, the State University of New York or the City University of New York, regardless of whether the employee is compensated. An Executive Chamber employee is permitted to engage in backroom services for compensation before a state agency, departments, etc. other than the Executive Chamber so long as the services do not constitute an appearance or practice before the agency, department, etc.

- There is a lifetime prohibition on an Executive Chamber employee from providing any services before a state agency or receiving compensation for services in connection with a matter in which the employee was directly concerned and in which they personally participated during the period of their employment with the Executive Chamber, or which was under their active consideration. The lifetime bar would prevent a former employee of the Executive Chamber from working on any matters related to legislation, rules, programs, contracts, and legal and administrative proceedings that the employee worked on or had oversight over during their employment in the Executive Chamber.

None of the aforementioned prohibitions apply to Mr. Percoco's proposed activities.



**To:** Todd. Howe[thowe@woh-solutions.com]  
**From:** Steve Aiello  
**Sent:** Wed 7/30/2014 4:58:19 PM  
**Subject:** Fwd: LABOR PEACE AGREEMENT  
REQUIREMENT: Syracuse Inner  
Harbor-eastern shore redevelopment |  
CFA-II-19115 Y362

[LaborPeace.Requirements.6.18.14.pdf](#)  
[ATT21391.htm](#)

Todd, is there any way Joe P can help us with this issue while he is off the 2nd floor working on the Campaign. We can't seem to put it behind us. I think Labor keeps drumming up their interpretation , to force us to sign with them. I could really use an advocate with regard to labor issues over the next few months.

Thanks  
Steve

Sent from my iPhone

Begin forwarded message:

595

**From:** "Joe Gerardi"  
<[JGerardi@corcompanies.com](mailto:JGerardi@corcompanies.com)>  
**Date:** July 30, 2014 at 12:42:47 PM EDT  
**To:** "Steve Aiello"  
<[SAiello@corcompanies.com](mailto:SAiello@corcompanies.com)>  
**Subject:** **FW: LABOR PEACE AGREEMENT  
REQUIREMENT: Syracuse Inner  
Harbor-eastern shore  
redevelopment | CFA-II-19115 Y362**

Steve,

I am thinking that the email below does what we discussed and have printed a copy. Also, will do a bullet point memo so that the outstanding ESD items are set out.

Please let me know if you need anything else, or feel otherwise.

Joe G.

Joseph B. Gerardi  
(315) 663-2100  
[jgerardi@corcompanies.com](mailto:jgerardi@corcompanies.com)

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**From:** Joe Gerardi  
**Sent:** Monday, July 28, 2014 2:17 PM  
**To:** Howe, Todd  
**Cc:** Steve Aiello  
**Subject:** FW: LABOR PEACE AGREEMENT  
REQUIREMENT: Syracuse Inner  
Harbor-eastern shore redevelopment  
| CFA-II-19115 Y362

Hello Todd,

I had an opportunity to meet Ken Adams at the 7/10 Governor's press event and he brought up the LPA for the hotel and indicated that he did not agree with ESD Legal's interpretation as noted in the email below.

We have not however heard anything however, since Bonnie's 7/7 email shown below and I wondered whether any further action is necessary on our part at this time. This is time sensitive as you know, since these ESD funds are to be utilized to construct parking/infrastructure for the development of the eastern side of the Inner Harbor.

Welcome back and I hope your vacation was restful!!

Joe G.

Joseph B. Gerardi  
(315) 663-2100  
[igerardi@corcompanies.com](mailto:igerardi@corcompanies.com)

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**From:** Palmer, Bonnie  
[\[mailto:BPalmer@esd.ny.gov\]](mailto:BPalmer@esd.ny.gov)  
**Sent:** Monday, July 07, 2014 1:06 PM  
**To:** Joe Gerardi  
**Cc:** Erin Hyatt; Catherine Johnson  
**Subject:** LABOR PEACE AGREEMENT  
REQUIREMENT: Syracuse Inner  
Harbor-eastern shore redevelopment  
| CFA-II-19115 Y362

Hi Joe –

ESD legal counsel has reviewed the information you have provided regarding recent revisions to the scope of the referenced CFA-II project and has determined that the revised infrastructure project will directly service the hotel(s) in the Inner Harbor Area. Accordingly, ESD funding for this project will trigger the requirement for the Labor Peace Agreement (LPA) we previously discussed.

Specifically:

**Labor Peace Agreement Requirement (LPA)**

Projects having a hotel as a principal function are required to demonstrate compliance with Section 2879-b of Public Authorities Law regarding labor peace (please see attached).

As required, please contact the appropriate local labor organization and negotiate an LPA at your earliest convenience.

Thank you.

BP

Bonnie Palmer  
Business Development Specialist  
Empire State Development  
Central New York Region  
620 Erie Blvd. West - Suite 112  
Syracuse, New York 13202  
(315) 425-9110 phone  
(315) 425-7156 fax  
[bpalmer@esd.ny.gov](mailto:bpalmer@esd.ny.gov)  
[www.esd.ny.gov](http://www.esd.ny.gov)

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**From:** Palmer, Bonnie  
**Sent:** Monday, June 30, 2014 8:34 AM  
**To:** 'Joe Gerardi'  
**Cc:** Erin Hyatt; Catherine Johnson  
**Subject:** RE: SYR-IH-eastern shore  
redevelopment

Thank you Joe...

We'll be back in touch shortly.

BP

Bonnie Palmer  
Business Development Specialist  
Empire State Development  
Central New York Region  
620 Erie Blvd. West - Suite 112  
Syracuse, New York 13202  
(315) 425-9110 phone



(315) 425-7156 fax  
[bpalmer@esd.ny.gov](mailto:bpalmer@esd.ny.gov)  
[www.esd.ny.gov](http://www.esd.ny.gov)

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**From:** Joe Gerardi  
[mailto:JGerardi@corcompanies.com]  
**Sent:** Friday, June 27, 2014 3:01 PM  
**To:** Palmer, Bonnie  
**Cc:** Erin Hyatt; Catherine Johnson  
**Subject:** SYR-IH-eastern shore redevelopment

Hello Bonnie,

I am writing to provide additional detail as to the parking lot to be constructed and the infrastructure to be included within the Project, as requested.

The parking lot is to be located along the south side of West Kirkpatrick Street, as generally shown on the parking lot Site Plan prepared by C&S Companies that is attached hereto. It will be owned and operated by COR West Kirkpatrick Street Company III, LLC and I believe the employee we discussed, was to be hired by COR in conjunction with the parking lot. The lot will be a shared lot to provide parking for the Aloft Hotel, a second hotel that will be constructed next to the Aloft, as well as other developments along Solar Street, all as generally shown within the area shown on the attached master plan.

The utility/infrastructure work to be constructed includes by way of example, sanitary and storm sewer structures, manholes and mains; water lines, electric and gas lines, etc., in order to provide utility services

to West Kirkpatrick Street and Solar Street developments. The utilities are generally shown on the attached Utility Map for Parcels A1, A2 and A3.

Estimated Project costs may be broken down as follows:

- (i) Engineering / Planning / \$275,000  
Soft Costs
- (ii) Utility Identification / \$747,222  
Removal / Reconstruction /  
Installation
- (iii) Parking Lot Construction, \$1,200,000  
including Landscaping,  
Lighting, etc.

**TOTAL \$2,222,222**

If you have any additional questions please contact me at your convenience

Joe G.

Joseph B. Gerardi  
Executive Vice President and Legal Counsel  
COR Development Company, LLC  
540 Towne Drive  
Fayetteville, NY 13066  
(315) 663-2100  
(315) 663-2109 (Fax)  
[jgerardi@corcompanies.com](mailto:jgerardi@corcompanies.com)

\*\*\* \*\*

**IMPORTANT:** This e-mail message and any attachments contain information intended for the exclusive use of the individual(s) or entity to whom it is addressed and may contain information that is

proprietary, privileged, confidential and/or exempt from disclosure under applicable law. If you are not the intended recipient, you are hereby notified that any viewing, copy disclosure or distribution of this information may be subject to legal restriction or sanction. Please immediately notify the sender by electronic mail or notify the System Administrator by telephone (518)292-5180 or e-mail ([administrator@esd.ny.gov](mailto:administrator@esd.ny.gov)) and delete the message.

Thank you.

\*\*\* \*\*

§ 2879-b. Labor peace. 1. As used in this section:

(a) "Contractor" means a company undertaking a covered project, or the operator of a hotel or convention center that is part of a covered project.

(b) "Substantial proprietary interest" means the authority: (i) owns fee title or a leasehold interest in the project of at least forty years; or (ii) provides financing for the project, whether by direct loan or indirectly by a guarantee, subsidy, deposit, credit enhancement or similar method.

(c) "Covered project" means any project in which an authority enters into an agreement for a development after the effective date of this section, where: (i) a hotel is one of the principal functions of the project; (ii) the entity the authority enters into an agreement with or its contractor or subcontractor contracts for the development of such hotel or convention center; (iii) the authority has a substantial proprietary interest in the project, or in the hotel or

convention center; and (iv) the hotel or convention center will have more than fifteen employees.

(d) "Labor peace agreement" means an agreement between the contractor and a labor organization that represents a substantial number of hotel or convention center employees in the state, which requires that the labor organization and its members refrain from engaging in labor activity that will disrupt the hotel's operations, including strikes, boycotts, work stoppages, corporate campaigns, picketing or other economic action against the covered project.

(e) "Public authority" shall mean a state public authority.

2. No public authority shall enter into any agreement or contract under which the public authority has a substantial proprietary interest in a covered project unless the agreement or contract requires as a material condition that the contractor or a subcontractor thereof enter into a labor peace agreement with a labor organization that represents hotel employees in the state, for a period of at least five years.

3. Any contractor or subcontractor covered by subdivision two of this section shall incorporate the terms of the labor peace agreement in any contract, subcontract, lease, sublease, operating agreement, concessionaire agreement, franchise agreement or other agreement or instrument giving a right to any person or entity to own or operate a hotel or convention center.

4. Notwithstanding any provision of this section, a public authority may enter into an agreement or

contract wherein the public authority has a substantial proprietary interest in a covered project without a contractor entering into a labor peace agreement, if the authority determines that the project would not be able to go forward if a labor peace agreement was required, or the costs of the project to the public authority would be substantially increased by such requirement. Such a determination shall be supported by a written finding by the public authority setting forth the specific basis for such determination, which may include experience with similar projects, earlier requests for proposal for the same project, or a detailed evaluation of potential bidders. Such written determination shall be included in any public materials provided to any board or agency official in connection with the project and shall be maintained by the authority.



STATE OF NEW YORK  
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ALBANY 12224

MEMORANDUM

**To:** File  
**From:** Seth H. Agata,  
First Assistant Counsel to the Governor  
**Date:** July 9, 2014  
**Subject:** Post-Employment Ethics  
Rules/Restrictions

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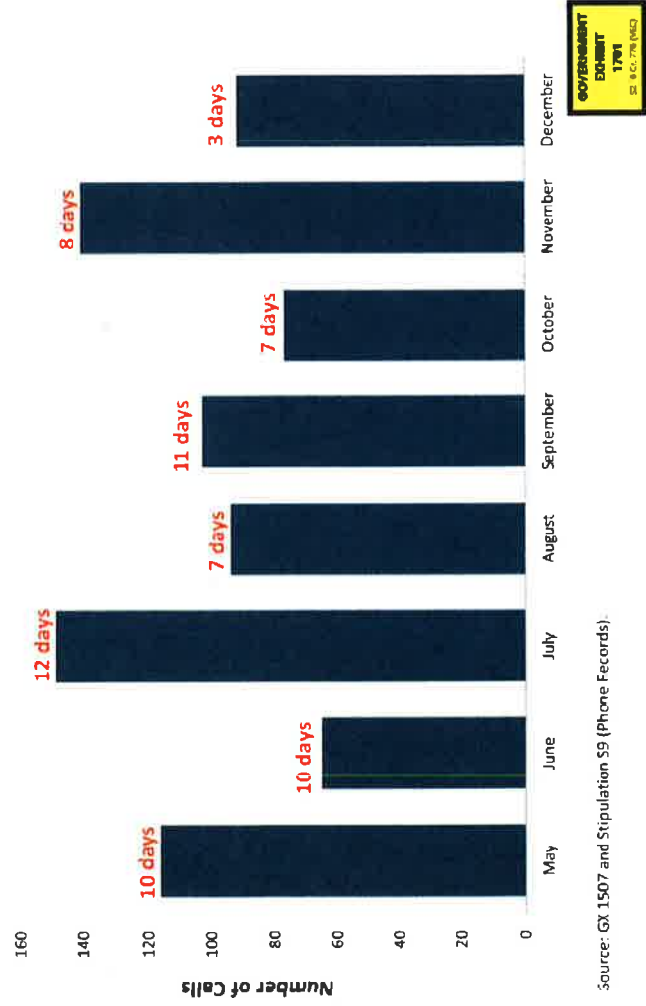
- For the two year period following the termination of their state service, an Executive Chamber employee is prohibited from appearing or practicing before the Executive Chamber regardless of whether the employee is compensated for the work. During this two year period, an Executive Chamber employee is also prohibited from receiving compensation for services rendered on behalf of any person, firm, corporation or association in relation to any case, proceeding, application, or other matter before the Executive Chamber. This “receiving compensation for services” bar — which is also referred to as the “backroom services rule” — is broad and prohibits, among other activity, participating in the development of a plan or strategy to influence any decision or action by the Executive Chamber, participating in a telephone call with the Executive Chamber, or instructing or advising a colleague placing a such call.

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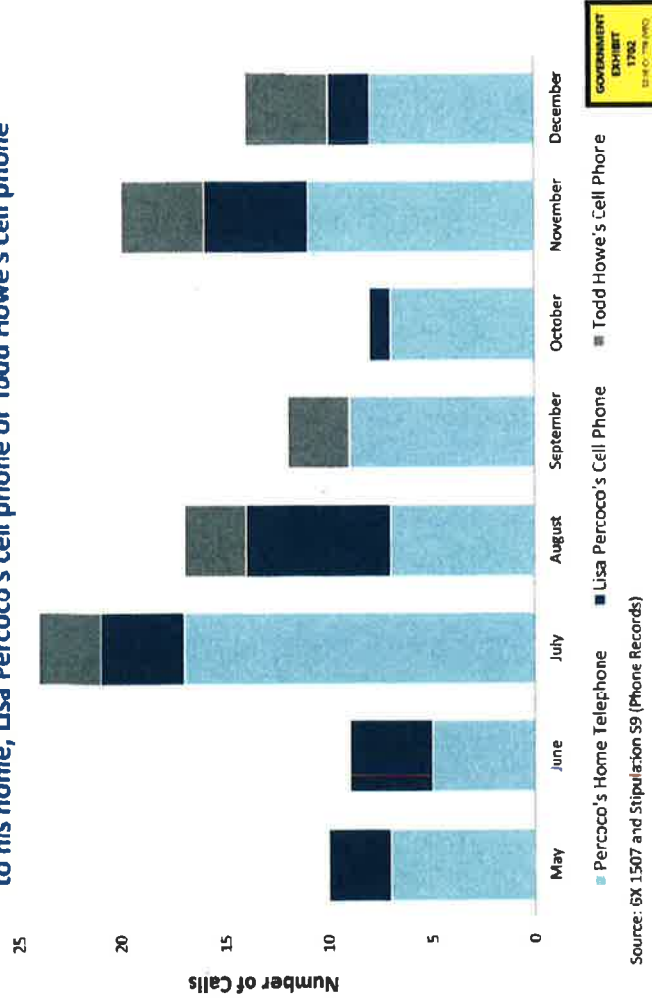
None of the aforementioned prohibitions apply to Mr. Percoco's proposed activities.



**Between May 1, 2014 and December 7, 2014 there were 837 calls on 68 days from Percoco's Executive Chamber Desk Telephone in NYC**



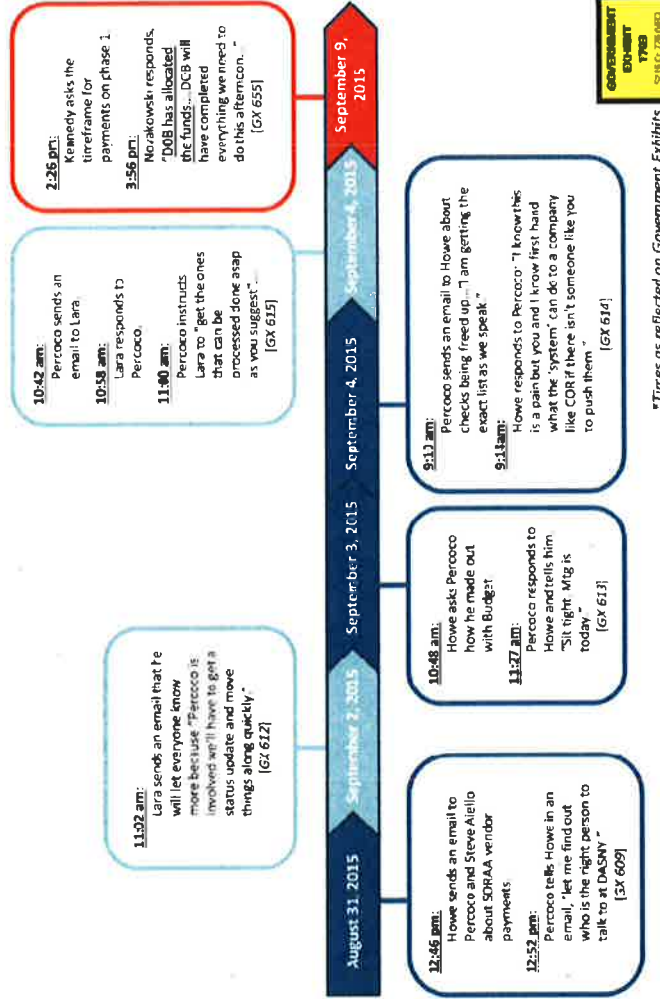
Of 837 calls made between May 1, 2014 and December 7, 2014 from Percoco's Executive Chamber Desk Telephone in NYC, 114 calls were made to his home, Lisa Percoco's cell phone or Todd Howe's cell phone



Source: 6X 1507 and Stipulation 59 (Phone Records)



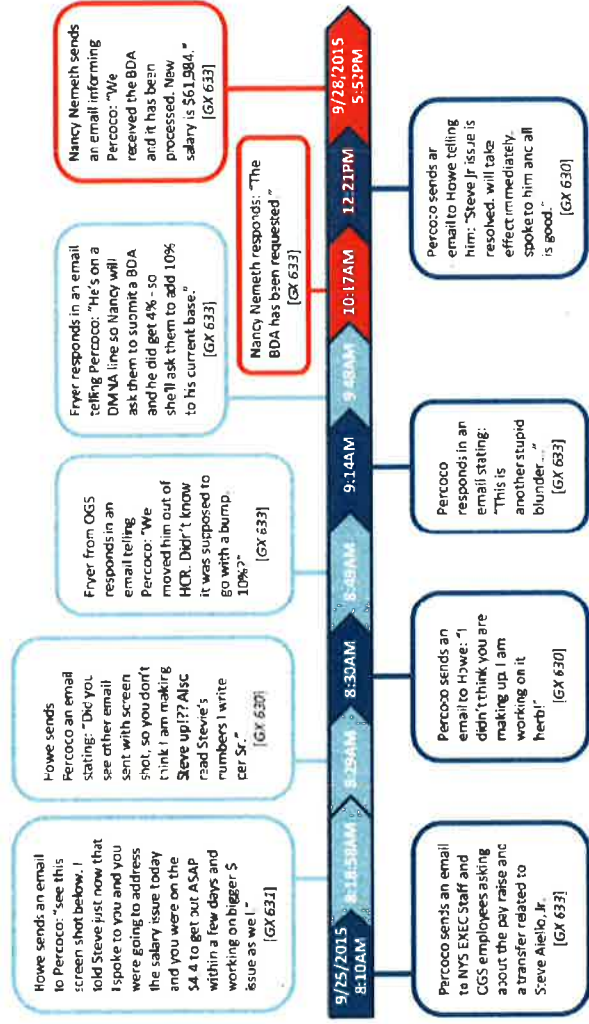
### Selected Emails August 31, 2015 through September 9, 2015



CONFIDENTIAL  
EXEMPT  
FROM  
FOIA b 7, b 7(D)

\*Times as reflected on Government Exhibits

Selected Emails September 25, 2015 through September 28, 2015



GOVERNMENT EXHIBIT 1704 S2 W C. 776 (NEC)

\* Times as reflected on Government Exhibits



**Selected Emails, Telephone Calls, and Building Access Records for December 3 and 4, 2014**

**December 3, 2014**

11:00AM 12:00PM 4:00PM

2 1 3 1

**11:49AM** [G] [G] [G]  
 Call from Kennedy's Albany Executive Chamber desk telephone to Fayle's cellphone. Call lasts 6 minutes. [GX 1508]

**11:49AM** [G] [G] [G]  
 Howe to Gerardi and Aiello: "Just hung up with JP. Fayle is being informed as I type this that ESD HQ in NYC does NOT concur with his read on this...JP said we should stand by and let message sink in over next several hours and then look for ESD to reach back out you, with a 'different' perspective. TH" [GX 586]

**11:54AM** [G] [G] [G]  
 Call from Kennedy's Albany Executive Chamber desk telephone to Mehul Patel at ESD NYC office. Call lasts 8 minutes. [GX 1508]

**12:14PM** [G] [G] [G]  
 Call from Kennedy's Albany Executive Chamber desk telephone to Perroco's office. Call lasts 2 minutes. [GX 1508]

**12:46PM** [G] [G] [G]  
 Gerardi to Howe and Aiello: "Great news, thanks for your note...I will stand by and let you know when I hear from Fayle." [GX 586]

**12:45PM** [G] [G] [G]  
 Howe to Gerardi and Aiello: "Great...JP just called me back to say Fayle should be reaching out to you. Let me know when you do and I'll close loop with JP..." [GX 586]

**12:45PM** [G] [G] [G]  
 Gerardi to Howe and Aiello: "Ok." [GX 586]

**4:24PM** [G] [G] [G]  
 Fayle to Cassidy and Kennedy: "Left message for Joe [Gerardi] to call me. Once he does I'll let him know the issues resolved." [GX 587]

\* Times as reflected on Government Exhibits

**Selected Emails, Telephone Calls, and Building Access Records for December 3 and 4, 2014**

December 4, 2014



8

10:00AM

10:26AM

Call from Gerardi's desk phone to Fayle's cell phone. Call lasts 4 minutes. [GX 1505]

11:00AM

11:37AM

Gerardi to Howe and Aiello: "I wanted to let you know that I spoke with Jim Fayle this morning and he advised that they have convinced ESD that the hospitality portion of the Syracuse Inner Harbor development is relatively minor. Therefore, the ESD funds awarded can be used to build the parking lot and infrastructure contemplated without the need for a LPA.

11:43AM

Howe to Aiello and Gerardi: "Amazing how Fayle re-writes history!" [GX 589]

I will be sending him a breakdown of the various mixed uses/square footages that will be developed at the IH and within the next two weeks ESD will prepare a revised Incentive Proposal. Thank you and JP for your efforts!" [GX 589]

11:46AM

Aiello to Howe: "Totally Amazing. That's why Fayle looks like Santa! He underestimated the power of TH, JP!" [GX 590]

Howe to Aiello: "Not me, JP."

11:53AM

Aiello to Howe: "You connected us to JP. Take some credit. Most clients forget your contribution behind the seen." [GX 590]

11:38AM

Howe to Gerardi and Aiello: "Great. Thanks." [GX 589]

11:41AM

Aiello to Howe and Gerardi: "They convinced ESD? Laughable!" [GX 589]

11:53AM

Gerardi to Howe and Aiello: "Agreed... S.H.E.A.D!" [responding to Howe's email at 11:48AM] [GX 591]

\* Times as reflected on Government Exhibits

**Selected Emails for July 2014 to December 1, 2014**

July 7, 2014

July 16, 2014

July 28, 2014



1:08PM [X]

Bonnie Palmer emails Joseph Gerardi and two other employees at COR: "Hi Joe - ESD legal counsel has reviewed the information you have provided regarding recent revisions to the scope of the referenced CPA-II project and has determined that the revised infrastructure project will directly service the hotel(s) in the Inner Harbor Area. Accordingly, ESD funding for this project will trigger the requirement for the Labor Peace Agreement (LPA) we previously discussed"

5:57PM [X]

Andrew Kennedy emails Todd Howe: "Let's discuss. If COR can demonstrate that the CEA funds will be used to support public infrastructure improvements ie parking for hotel guests and general public, then the LPA is not triggered. If the LPA is required, we just need COR to demonstrate that union wages are not feasible and get ESD Board to agree."

9:43PM [X]

Howe forwards Richard Lederling an email from Joseph Perocco and says: "Rich - let's discuss tomorrow. Steve needs labor relations help on inner harbor and Joe would like to assist. Let's discuss tomorrow."

Memorandum attached to email was written by Seth Agata. [GX 543A]

6:18PM [X]

Gerardi emails Howe and Aiello: "We have not however heard anything however, since Bonnie's 7/7 email shown below and I wondered whether any further action is necessary on our part at this time. This is time sensitive as you know since these ESD funds are to be utilized to construct parking/infrastructure for the development of the eastern side of the Inner Harbor."



\* Times as reflected on Government Exhibits



### Selected Emails for July 2014 to December 1, 2014

July 30, 2014 1
July 31, 2014 1
August 11-12, 2014 1 2 3

**4:58PM**
  
 Aiello emails Howe: "Todd, is there any way Joe P can help us with this issue while he is off the 2nd floor working on the Campaign. We can't seem to put it behind us. I think Labor keeps drumming up their interpretation, to force us to sign with them. I could really use an advocate with regard to labor issues over the next few months."
   
 [GX 550]

**12:37PM**
  
 Aiello forwards Howe an email and attachment from a union representative and says: "Todd, can call Joe P. Need help on this."
   
 [GX 551]

**12:02PM**
  
 Howe emails Aiello: "Steve - per our discussion Attached is the Labor Relations Invoice for June, July & August 2014. Thank you. TH"
   
 [GX 552]

#### Checks

**August 11, 2014** – Check for \$15,000 from COR Inner Harbor to Potomac Strategies. Attention Todd Howe
   
 [GX 1401(1)]

**August 12, 2014** – Check for \$15,000 from Potomac Strategies to Lisa Perocco
   
 [GX 1420(1)]

\* Times as reflected on Government Exhibits

**Selected Emails for July 2014 to December 1, 2014**

August 22, 2014



2

October 22-24, 2014



2

November 15, 2014



1

10:58AM

Gerardi emails Howe and Aiello: "Although ESD's position appears to be based on their legal counsel's opinion (noted in Bonnie Palmer's 7/7 email below), Steve and I wondered whether it would be appropriate at this time to engage our labor consultant, to try to resolve this matter, given that we would like to start construction this fall, but will not be able to proceed if an LPA is required."

[EX-15511]

2:59PM

Gerardi emails Howe: "Let me know if you would like this said any differently...hope things are well BIG GUY!"

[EX-15511]

Checks



October 22, 2014 - Check for \$20,000 from COR Inner Harbor to Potomac Strategies, Attention Todd Howe

[EX-15511]

October 24, 2014 - Check for \$20,000 from Potomac Strategies to Lisa Perocco

[EX-15511]

11:36PM

Gerardi forwards an email to Perocco, Aiello and Howe: "Hello Joe, This is the email that I received regarding ESD Counsel's position with regard to the Labor Peace Agreement requirements, which are attached. According to Jim Favle, the local ESD Regional Director, ESD NYC Counsel has determined that our 'project' will trigger the requirement for a LPA."

[EX-15511]

\* Times as reflected on Government Exhibits

**Selected Emails for July 2014 to December 1, 2014**

November 20, 2014



2

**7:36AM**

Gerardi emails Aiello and Howe: "Jim Fayle wants to discuss potential ways to solve the repurposing/labor peace agreement issue....I am inclined to listen to what he may have to say, although I think he is looking for us to simply move the ESD 5 away from the hotel somehow. Also, note that his email includes Charles Imohiosen....not sure who that is....may be Bonnie's replacement. Any thoughts?" [GX 572]

December 1, 2014



1

**2:47PM**

Gerardi forwards an email from Fayle to Aiello and Howe and says: "Fyi.... this is on the issue that JP is working on....still holding off scheduling a call?" [GX 583]

**7:38AM**

Howe emails Gerardi and Aiello: "Let's not do anything until JP tells us. Make sense?" [GX 572]

\* Times as reflected on Government Exhibits



C O  
NH FQ SS

**Executive Chamber**  
**PERSONNEL ACTION REQUEST**

Joseph		Percoco	
First Name	M.I.	Last Name	Social Security Number

Home Address	Date of Birth NYS Driver ID#
--------------	---------------------------------

City, State, Zip	Home Phone
------------------	------------

<i>Office of the Secretary</i> Unit	/s/ <i>Larry Schwartz</i> Supervisor
--	---

N# \_\_\_\_\_ Proxy \_\_\_\_\_ ID# \_\_\_\_\_ PIN# \_\_\_\_\_

Emergency Contact: \_\_\_\_\_ Number: \_\_\_\_\_

Room# \_\_\_\_\_ Work Location:  Albany  NYC  Wash D.C.

<i>Executive Deputy Secretary</i> Working Title	<del>170,000</del> 169,000 Salary
--	--------------------------------------

<i>to the Governor</i> Payroll Title	803 Line Item#
---	-------------------

Conf. Asst.

12/8/14 bob  
Effective Date

OVERTIME Eligible  
 yes  no

ACTION  APPOINTMENT \_\_\_ Leave of  
Absence  
\_\_\_ Salary Increase \_\_\_ Change of  
Line Item  
\_\_\_ Separation \_\_\_ Other\_\_\_\_\_

External  Transfer to \_\_\_ Previous State  
Agency\_\_\_\_\_

BCI:  
Necessary  yes  no Has it been  
started:  
 yes  no

ETHICS  
Notification  
Required  yes  no Veteran Status:\_\_\_

Confidential  
List  yes  no

Comments: Perm - Exempt U-void  
1/1/11 4/21/14

Authorization:

GOVERNOR /s/ Larry Schwartz  
(or designee)

NAME Joseph Perocco DATE 2/12/15  
BOARD/JOB Ex Member  
NYS TAX Timely

BEI - it

A2 - 2- Nov 14 - 11/14/14 - Sp Asst. Assoc Council  
NYS Hor - Various pos

5 - Pol. Ass. Andrew Cuomo - Campaign mgmt.

6 - Compensation - Monthly Comp from 7/14 - 12/14

7 - Inc - sup - State of NY - CNA Consulting } Self  
Col Development

Chris Pitt LLC - salary - sponsor

8 (b, g, r, v, w, x) No Conts Prov

12 - 11. Retirement - Estate of Angela Perocco

13 - Inc - Sponsor - Chris Pitts LLC - wages

14 - Barclays Bank & Chase ft - Cr. Cards





## APPOINTMENTS QUESTIONNAIRE

### All Information is Strictly Confidential

The Appointments Questionnaire is designed to gather detailed information from potential appointees/nominees to positions which may become available within the administration of Governor Andrew M. Cuomo. **Every question must be answered. If a question is inapplicable, write "N/A" in the answer space provided. Please attach a copy of your current resume, birth certificate, passport, relevant diplomas, and, if applicable, marriage certificate, divorce decree, or military form DD-214.**

Please return the completed material by email to [RecruitmentandPublicService@ogs.ny.gov](mailto:RecruitmentandPublicService@ogs.ny.gov) or to the following address:

Office of General Services  
Center for Recruitment and Public Service  
Corning Tower, 40th Floor  
Albany, New York 12242

### SECTION 1

<b>NAME AND CONTACT INFORMATION</b>		
<i>LAST</i> Percoco	<i>FIRST</i> Joseph	<i>MIDDLE</i>
<i>MAIDEN NAME (IF APPLICABLE)</i>	<i>ALL OTHER NAMES USED</i>  Joe, Giuseppe	

<i>DATE OF BIRTH</i> [REDACTED] 1969	<i>WORK TELEPHONE NUMBER</i> 212-681-7637	<i>FAX NUMBER</i>
<i>CELLULAR PHONE NUMBER</i> 917-885-2576	<i>EMAIL ADDRESS</i> Perc15@aol.com	
<i>HOME PHONE NUMBER</i> 914-533-7246	<i>HOME ADDRESS</i> [REDACTED] South Salem, NY 10590	

Have you used a name other than the one given above? If so, please set forth the name(s) and explain why: \_\_\_\_\_

**SECTION 2** N/A

<b>RETIREMENT</b>	<i>Please list any retirement plan (pension, deferred compensation or other) for you or your spouse/partner from which you are currently drawing or eligible to draw benefits.</i>	
SELF:	PLAN:	Currently Drawing/Eligible to Draw YES <input type="checkbox"/> NO <input type="checkbox"/>
SPOUSE:	PLAN:	Currently Drawing/Eligible to Draw YES <input type="checkbox"/> NO <input type="checkbox"/>



1. Please list any **uncompensated** board position, office, trusteeship, directorship, partnership, or position of **any** nature, held by **you or your spouse** with any organization, firm, corporation, partnership or other association. (You may attach a current resume if necessary.)

N/A

Position	Organization	Self/Spouse

2. Please list all governmental positions (federal, state or local) in which you have served or presently are serving, **including** uncompensated positions on governmental boards and commissions. Please indicate dates.

Government Entity	Position	Dates
US Govt	Special Asst & Assoc. Counsel	5/99-1/01
NYS Govt	Exec Rep Secretary	1/11-4/14
NYS Govt (AG)	Special counsel	1/07-12/10
NYC Govt	Public Advocate/ Mayor's office	6/95-10/98

3. Identify any civic, educational or charitable organizations of which you are a member. Specify the name and address of the organization, the dates of your membership, whether such organization has a contract with or otherwise receives money from

New York State or any municipality within New York State, and any title that you held in the organization.

N/A

Organiza- tion	Address	Date(s) of Membership/ Title	NYS Contract/ Money Received (if any)

4. Please indicate any relationship which any of the organizations listed in response to **questions 1, 2, and 3, above as well as your current employer**, have with any State entity (i.e. licensing, regulatory, contractual, funding, etc.).

N/A

Organization	State Entity	Relationship

5. Identify all memberships and offices held in political parties or election committees during the past ten years.

2014

Organization	Office Held	Dates	Compensation Received	
Andrew Cuomo	Campaign Mgr	4/14-12/14	YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>
			YES <input type="checkbox"/>	NO <input type="checkbox"/>
			YES <input type="checkbox"/>	NO <input type="checkbox"/>
			YES <input type="checkbox"/>	NO <input type="checkbox"/>

6. If you received compensation, please provide the particulars.

16,666.00 / month from 4/14-12/14

7. Unless otherwise specifically asked to complete a Financial Disclosure statement by the appointing authority, please list below all sources of income, and estimated amounts for each source in excess of \$1,000, for you and your spouse **for the last twelve months**. Sources of income include, **but are not limited to**, state salary, income from other compensated employment whether public or private, directorships and other fiduciary positions, contractual arrangements, teaching income, partnerships, honorariums, lecture fees, consultant fees, bank and bond interest, dividends, real estate rents, and sale or exchange of real or other property. Indicate whether income is paid to you, your spouse, or jointly. **This includes compensated positions listed above. If you filed a Financial Disclosure Statement**

**pursuant to Public Officers Law section 73-a for the past year, that may be filed with this statement in lieu of supplying the information below.**

*Time Period Covered* \_\_\_\_\_

<b>Source and Nature</b>	<b>Income</b>	<b>Self/Spouse</b>
State of NY	154,000/year from 1/1/14–4/15/14	Self
CHA Consulting	22,500.00	Self
COR Development	30,000.00	Self
CWS PiH LLC	90,000.00	Spouse

**8. If you answer “YES” to any of the following questions, please provide a detailed explanation. Attach a separate sheet if necessary.**

(a)	Have you ever been convicted of, or entered into a plea of guilty or nolo contendere to any felony or misdemeanor which has not been sealed?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
(b)	Have you ever been convicted of or pleaded guilty to a motor vehicle offense, excluding parking tickets or other non-moving violation, or have you ever had your license suspended or revoked?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
(c)	Have you ever been disciplined by any court, administrative agency, professional association, disciplinary	<input type="checkbox"/>	<input checked="" type="checkbox"/>

	committee or other professional group, or the subject of any proceeding, inquiry or investigation by any professional association, including bar association, of which you were or are a member?		
(d)	Are there any criminal actions or proceedings currently pending against you?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
(e)	Have you ever had an employment discrimination or sexual harassment charge filed against you that has been substantiated or otherwise upheld by a court of law, administrative agency, arbitrator or grievance committee or such charge settled or otherwise resolved with a finding or acknowledgement that you were at fault?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
(f)	Are you presently, or have you ever been named as a defendant or respondent in any agency proceeding or civil litigation?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
(g)	Has any business in which you are or were an owner, officer, director or partner, been a plaintiff or a defendant in a civil lawsuit?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
(h)	Is anyone currently threatening to sue you or any business in which you are an owner, officer, director or partner?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
(i)	Are there currently any unsatisfied liens or judgments against you or any business in which you are an owner, officer, director or partner?	<input type="checkbox"/>	<input checked="" type="checkbox"/>

(j)	Are you in arrears on any child support and/or maintenance obligations?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
(k)	Are you or any businesses in which you are an owner, officer, director or partner in default of tax obligations to federal, state or local authorities?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
(l)	Are there any tax liens currently assessed or pending against you, any business in which you are an owner, officer, director or partner, or any real property in which you have a beneficial or legal interest?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
(m)	Are you in arrears on the repayment of any loans?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
(n)	Were you ever expelled, suspended, placed on probation, or subject to any other disciplinary action while attending college or graduate school?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
(o)	Are you a resident of New York State?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
(p)	Do you, or any immediate family member own or have any interest in real property that has been cited for health, safety or environmental violations by federal, state or local authorities?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
(q)	Have you or any member of your immediate family engaged in any lobbying activities within the last five years?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
(r)	Have you or any member of your immediate family previously registered with the Temporary Commission on Lobbying, the Public	<input type="checkbox"/>	<input checked="" type="checkbox"/>

	Integrity Commission, or Joint Commission on Public Ethics?	<input type="checkbox"/>	<input type="checkbox"/>
(s)	Have you failed to file your federal or state income tax returns at any time within the last ten years?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
(t)	Have you ever had an order of protection entered against you in a court proceeding?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
(u)	Have you ever been cited for contempt of any court, legislative, civil or criminal investigative body or grand jury?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
(v)	Have you, your spouse or any corporation, firm, partnership or other business enterprise or non-profit organization or other institution in which you or your spouse have served as an owner, officer, director, trustee or partner ever filed a petition for bankruptcy under the U.S. Bankruptcy Code?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
(w)	Within the last 5 years, have you employed any domestic or household help, including but not limited to a housekeeper, babysitter, nanny or gardener for whom you did not pay withholding taxes or other employment-related assessments (including but not limited to unemployment insurance or workers' compensation payments)?	<input checked="" type="checkbox"/>	<input type="checkbox"/>
(x)	With respect to such individuals identified in (w), were such	<input checked="" type="checkbox"/>	<input type="checkbox"/>

	individuals United States citizens or documented aliens?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
(y)	Have you ever been involuntarily terminated from a job or position or resigned from a job or position after being informed that you would be involuntarily terminated?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
(z)	Have you ever maintained a weblog ("blog")? If so, please provide URL address, and dates on which the blog was maintained, or which you wrote?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
(aa)	Do you have any relationship, personal or professional, with any persons employed by or engaged in business with the agency, board or authority to which you seek appointment?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
(bb)	Do you have any commitments or agreements to pursue outside employment, with or without compensation, while you may be employed by the State of New York?	<input type="checkbox"/>	<input checked="" type="checkbox"/>
(cc)	Do you, your spouse or immediate family member own or have any interest in any real property which during the time of such ownership has been cited for health or environmental violations, been condemned or closed, or been determined to contain hazardous materials by any federal, state, or local authority?	<input type="checkbox"/>	<input checked="" type="checkbox"/>



9. Y N

Are there any matters which may involve a conflict of interest or an appearance of such a conflict or any problem in connection with your appointment to the position for which you are being considered, which are not fully covered by your answers to this questionnaire?	<input type="checkbox"/> <input checked="" type="checkbox"/>
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If yes, please set forth the pertinent facts below, including an explanation of how you would propose to resolve such conflict of interest or problem (e.g. divestiture, removal, resignation, etc.)

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10. Y N

All appointees subject to confirmation by the Senate must consent to review. Do you consent to a copy of this questionnaire being reviewed by the Senate Finance Committee if you are nominated for the position you seek?	<input type="checkbox"/> <input type="checkbox"/>
--	---

12/1/14

Joseph Percoco

**AUTHORIZATION AND RELEASE OF  
PERSONAL INFORMATION INCLUDING  
TAX INFORMATION AND CERTIFICATION**

- A. I understand that if appointed, any false statement or information provided during the appointment process may result in dismissal. I further understand that this questionnaire is not, and is not intended to be, a contract of employment, nor does this questionnaire obligate the Cuomo Administration in any way. You are hereby authorized to make any investigation of my background, including prior employment information and education preparation. You are also authorized to make any investigation of credit reports, court records and criminal activity through any law enforcement, investigative or credit agencies or bureaus of your choice. I hereby release from liability the Cuomo Administration, its individual members and advisors, the State of New York, and all persons and agencies supplying such information to them, and I further release such persons and agencies from any obligation to provide me with notification of such disclosure.
- B. I further authorize the Department of Taxation and Finance to examine any of my personal income tax returns for any year, including any schedules and attachments to those returns, for the purpose of ascertaining the correctness of those returns, schedules and attachments. I also authorize the Tax Department to inspect any correspondence, including protests that I may have had with the Department concerning those returns, schedules or

attachments. If the Department of Taxation and Finance determines that any return, schedule or attachment is incorrect in any detail, or information in any correspondence or protest might affect my personal tax liability for the past or future years, I authorize the Department of Taxation and Finance to disclose those returns, schedules, attachments and correspondence as well as any information learned during an investigation of personal income tax liability, to the Counsel to the Governor or his/her designee and to discuss its findings with said Counsel or such designee. I will commence no claim against the State of New York, the Department of Taxation and Finance and its officers if they make this disclosure according to this release.

My Social Security Number is: [REDACTED]

I certify that I have reviewed the information in this questionnaire and that, to the best of my knowledge, the information I have supplied is complete, true and accurate.

Signature: /s/ Joseph Percoco

Print Name: Joseph Percoco

Date: 11/25/14

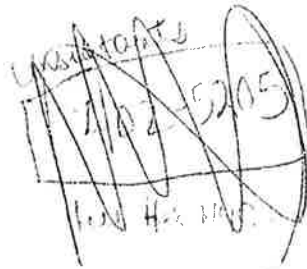
It is the policy of the Cuomo Administration that no person shall, on the basis of age, race, religion, creed, color, national origin, sexual orientation, military status, sex, disability, pre-disposing genetic characteristics, marital status, relevant criminal record history, domestic violence victim status, or gender identity be unlawfully excluded from participation in, be denied the benefits of, or be



**PLEASE KEEP A COPY OF THIS FORM FOR  
YOUR RECORDS APPOINTMENTS  
QUESTIONNAIRE CHECKLIST**

**Before returning your questionnaire, please  
remember to:**

1.  Review the questionnaire to ensure **ALL** questions have been answered.
2.  **Include any necessary attachments**, such as a resume or separate sheets needed to provide detailed explanation to any questions that may require it.
3.  **Sign and date** the information release form located at the end of the questionnaire.
4.  Keep a copy of the **completed** questionnaire for your records.

A handwritten scribble consisting of several overlapping loops and lines. The number "5205" is clearly visible in the center of the scribble.

\* \* \*

636



STATE OF NEW YORK  
EXECUTIVE CHAMBER  
683 THIRD AVENUE  
NEW YORK, NY 10017

April 16, 2014

Dear Larry,

Please be advised that effective at the close of business on Friday, April 18, 2014 I shall resign my duties as Executive Deputy Secretary to the Governor. I have completed all of the proper paperwork and it will be submitted to both you and Terri Brenan by Monday, April 21, 2014.

Thank you for your time and consideration.

Joseph Polocco

A handwritten signature in black ink, appearing to read 'JP', written over the typed name 'Joseph Polocco'.



**NOTICE OF EMPLOYMENT**  
**State of New York**  
**Executive Chamber**  
**Agency Code - 01000**

Joseph Percoco

  
 South Salem, NY 10590


PP#2

TITLE & GRADE	SALARY
Program Associate, NS	\$155,974 + \$3,026 Loc. Pay

OT ELIGIBILITY	PAYROLL ITEM/ POSITION NO.
Ineligible	604/3196

UNIT	EFFECTIVE DATE	NEGOTIAT- ING UNIT	I.C.
Unit: Office of the Secretary Budgeted Location: New York City	4/21/2014 bob	M/C	0000

<b>TRANSACTION INFORMATION:</b>	
<b>Separation Information</b>	
Working Title: Executive Deputy Secretary	
Separation Type: Resignation External	

Action Initiated By: Erin Ryan Director of Personnel April 23, 2014 	EMPLOYEE SUPERVISOR HRISNet/T&A	HRIS Date Entered:	Initials:
		NYSTEP Codes: <u>TER/RSN</u>	
		PayServ Codes: <u>TER/R SX</u>	
		Remove Codes: Y N	


  
 Date: 04/23/14  
 [Signature]  
 4/23/14





PP 1 C O  
NH FQ SS

**Executive Chamber**  
**PERSONNEL ACTION REQUEST**

Joseph		Percoco	
First Name	M.I.	Last Name	Social Security Number

Home Address	Date of Birth NYS Driver ID#
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City, State, Zip	Home Phone
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<i>Office of the Secretary</i> Unit	<i>/s/ Larry Schwartz</i> Supervisor
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N# \_\_\_\_\_ Proxy \_\_\_\_\_ ID# \_\_\_\_\_ PIN# \_\_\_\_\_

Emergency Contact: \_\_\_\_\_ Number: \_\_\_\_\_

Room# \_\_\_\_\_ Work Location:  Albany  NYC  Wash D.C.

<i>Executive Deputy Secretary</i>	155,974
Working Title	Salary

<i>Prog. Assoc.</i>	604
Payroll Title	Line Item#

4/21/14bob	OVERTIME Eligible <input type="checkbox"/> yes <input checked="" type="checkbox"/> no
Effective Date	



18-2990 (L)

*United States v. Percoco*

United States Court of Appeals  
For the Second Circuit

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August Term 2019

Argued: March 12, 2020

Decided: September 8, 2021

Nos. 18-2990, 18-3710, 19-1272

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UNITED STATES OF AMERICA,

*Appellee,*

*v.*

JOSEPH PERCOCO, STEVEN AIELLO, JOSEPH GERARDI,  
LOUIS CIMINELLI, ALAIN KALOYEROS, AKA DR. K,

*Defendants-Appellants,*

PETER GALBRAITH KELLY, JR.,  
MICHAEL LAIPPLE, KEVIN SHULER,

*Defendants.\**

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Appeal from the United States District Court  
for the Southern District of New York  
No. 16-cr-776, Valerie E. Caproni, *Judge.*

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\* The Clerk of Court is respectfully directed to amend the case caption to conform with the caption above.

Before: RAGGI, CHIN, AND SULLIVAN, *Circuit Judges*.

Defendants-Appellants Joseph Percoco and Steven Aiello appeal from judgments of conviction entered in the United States District Court for the Southern District of New York (Caproni, *J.*), after a jury found Aiello guilty of one count of conspiracy to commit honest-services wire fraud and found Percoco guilty of two counts of conspiracy to commit honest-services wire fraud, as well as one count of solicitation of bribes and gratuities. On appeal, the defendants principally challenge the district court's instruction that (1) the jury could convict them of conspiracy to commit honest-services fraud based on Percoco accepting payment to take official action to benefit the briber "as opportunities arise" and (2) the defendants could be liable for conspiracy to commit honest-services fraud for actions that Percoco agreed to undertake while he was not formally employed as a state official. Although the as-opportunities-arise instruction fell short of our recently clarified standard, which requires that the honest-services fraud involve a commitment to take official action on a particular matter or question, that error was harmless. The second contested instruction was not error at all. In so concluding, we reaffirm our decades-old decision holding that a person who is not technically employed by the government may nevertheless owe a fiduciary duty to the public if he dominates and controls governmental business, and is actually relied on by people in the government because of some special relationship. Finding no merit in the other arguments raised on appeal, we **AFFIRM** the judgment of the district court.

Matthew D. Podolsky (Robert L. Boone, Janis M. Echenberg, Won S. Shin, *on the brief*), Assistant United States Attorneys, *for* Audrey Strauss, United States Attorney for the Southern District of New York, New York, NY, *for Appellee* United States of America.

Michael L. Yaeger, Carlton Fields, P.A., New York, NY (Walter P. Loughlin, New York, NY, *on the brief*), *for Defendant-Appellant* Joseph Percoco.

Alexandra A.E. Shapiro (Daniel J. O'Neill, and Fabien Thayamballi, *on the brief*), Shapiro Arato Bach LLP, New York, NY *for Defendant-Appellant* Steven Aiello.

RICHARD J. SULLIVAN, CIRCUIT JUDGE:

This case, which concerns public corruption in New York State, requires us to again consider the reach of the federal fraud and bribery statutes. Defendants-Appellants Joseph Percoco and Steven Aiello appeal from judgments of conviction entered in the United States District Court for the Southern District of New York (Caproni, *J.*), after a jury found Aiello guilty of conspiracy to commit honest-services wire fraud, in violation of 18 U.S.C. § 1349, and found Percoco guilty of both conspiracy to commit honest-services wire fraud, in violation of 18 U.S.C. § 1349, and solicitation of bribes or gratuities, in violation of 18 U.S.C. §§ 666(a)(1)(B) and 2.<sup>1</sup>

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<sup>1</sup> The district court held a second trial on separate, fraud-related counts in which Aiello, Alain Kaloyeros, Joseph Gerardi, and Louis Ciminelli were convicted on several conspiracy and substantive wire fraud counts, and Gerardi was convicted on a false statement count. Although the cases were consolidated upon appeal, the fraud trial is addressed in a separate opinion in

On appeal, the defendants argue that the district court committed reversible error when it (1) instructed the jury that it could convict defendants of conspiracy to commit honest-services fraud based on Percoco accepting payment to take official action to benefit the briber “as opportunities ar[i]se”; (2) charged the jury that the defendants could be liable for conspiracy to commit honest-services fraud for actions Percoco took while he was not formally employed as a state official; (3) instructed the jury that Percoco could be liable under § 666 for soliciting, demanding, accepting, or agreeing to accept a gratuity as a reward for certain action; (4) constructively amended Aiello’s indictment by permitting his conviction to be based on acts Percoco committed while he was not a public official; (5) denied defendants’ motions for a judgment of acquittal based on the insufficiency of the evidence at trial; and (6) ordered forfeiture against Percoco in the amount of \$320,000. Finding none of these arguments persuasive, we **AFFIRM**.

## I. BACKGROUND

### A. Facts

This case involves two schemes in which Percoco—a longtime friend and top aide to former Governor Andrew Cuomo—accepted payment in exchange for promising to use his position to perform official actions. For the first scheme, Percoco promised to further the interests of an energy company named Competitive Power Venture (“CPV”). For the second,

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*United States v. Aiello*, Nos. 18-3710-cr, 18-3712-cr, 18-3715-cr, and 18-3850-cr.

Percoco agreed with Aiello to advance the interests of Aiello's real estate development company, COR Development Company. Drawing from the evidence introduced at trial, we briefly describe the facts of these schemes in the light most favorable to the government. *See United States v. Silver*, 948 F.3d 538, 546 n.1 (2d Cir. 2020), *cert. denied*, 141 S. Ct. 656 (2021).

### 1. The CPV Scheme

The CPV scheme started in 2012, when Percoco served as a high-level official in the Governor's Office, also called the Executive Chamber. For all his political influence, Percoco found himself financially constrained. So he reached out to his friend Todd Howe, who was an influential and corrupt lobbyist. Percoco confided in Howe that money was tight, and he asked if any of Howe's clients would hire Percoco's wife. Sometime later, Howe approached Peter Galbraith Kelly, Jr., whose energy company, CPV, was angling for a so-called "Power Purchase Agreement" that would have required New York State to purchase power from CPV.

Percoco, Howe, and Kelly met over dinner to discuss an arrangement whereby Percoco would help CPV secure the Power Purchase Agreement in exchange for securing employment for—and sending payments to—Percoco's wife. Throughout the fall of 2012, Percoco pressured Howe to close the deal with Kelly so that Percoco could earn what he and Howe code-named "ziti"—a reference to the term for payoffs featured in the mafia-themed television show "The Sopranos." *See* Suppl. App'x at 1–3; App'x at 553. CPV later hired Percoco's wife as an "education consultant" paying her

\$7,500 a month for a few hours of work each week. To conceal this arrangement, Kelly instructed his employees to omit the last name of Percoco's wife from CPV materials, and routed the payments through a third-party contractor, whom Percoco referred to as Kelly's "money guy." Suppl. App'x at 212. Invoices from Kelly's "money guy" likewise excluded any reference to Percoco's wife.

In exchange for these payments, Percoco agreed to help CPV obtain a Power Purchase Agreement from New York State. Later, while serving as Executive Deputy Secretary in Cuomo's administration, Percoco confirmed in an email that he would "push on" the supervisor of New York's state agencies, Howard Glaser, to discourage the state from awarding a Power Purchase Agreement to one of CPV's competitors. Howe replied that Percoco had to "[h]old [Glaser's] feet to the fire" to "keep the ziti flowing." *Id.* at 30.

Percoco also accepted continued payments to influence New York State officials to approve a so-called "Reciprocity Agreement" between New York and New Jersey, which was designed to allow CPV to build a power plant in New Jersey by purchasing relatively inexpensive emission credits in New York. After an assistant commissioner in New York's Department of Environmental Conservation ("DEC") told Kelly that he would need a "push from above" to secure the agreement, *id.* at 8–10, Kelly, through Howe, reached out to Percoco for that push. In response, Percoco stated that he would contact the Commissioner of the DEC. When Howe followed up with Percoco about a week later, Percoco indicated that his mother was not well, and referred Howe to Glaser and another high-ranking official in Governor



Cuomo's administration who could contact the DEC Commissioner. Copying Percoco on the email, Howe forwarded the message to Glaser and the other official. Glaser and the other official then successfully directed the Commissioner to have the state agency enter into the Reciprocity Agreement with New Jersey.

## **2. The COR Development Scheme**

The second scheme began while Percoco was temporarily managing Governor Cuomo's reelection campaign in 2014. Pursuant to this scheme, Aiello arranged for his company, COR Development, to pay Percoco to take action to benefit the company. Initially, Aiello sought out Percoco's assistance so that COR Development could avoid entering into a potentially costly agreement with a local union, known as a "Labor Peace Agreement," prior to receiving state funding for a project. On July 30, 2014, Aiello emailed Howe asking whether "there is any way Joe P can help us" with the Labor Peace Agreement "while he is off the 2nd floor working on the Campaign." App'x at 680. The next day, Aiello followed up with an email to Howe asking him to "call Joe P." for "help" on the Labor Peace Agreement. Suppl. App'x at 59. Less than two weeks later, COR Development transferred \$15,000 to an entity that Howe controlled, prompting Howe to cut a \$15,000 check to Percoco's wife. In October 2014, after several emails were exchanged but before Percoco had taken any action concerning the Labor Peace Agreement, COR Development sent an additional \$20,000 to Percoco through the same circuitous route. Percoco received both payments after he had told his bank and

several others that he intended to return to the Governor's Office.

After receiving payment, Percoco directed a state agency, Empire State Development ("ESD"), to reverse its previous decision requiring COR Development to enter into a Labor Peace Agreement. On December 3, 2014, Howe forwarded Percoco an email from Aiello's partner, Joseph Gerardi, pressing Howe to have Percoco resolve the issue. Percoco responded that Howe should stand by; within an hour, Percoco called Andrew Kennedy, who oversaw ESD, and urged him to move forward without the Labor Peace Agreement.

At that point, Percoco was a few days from formally returning to his position in the Governor's Office and had already signed and submitted his reinstatement forms. In fact, Percoco's swipe-card and telephone records revealed that he was at his desk in the Executive Chamber when he directed Kennedy to resolve the Labor Peace Agreement in COR Development's favor. Kennedy testified that he interpreted Percoco's call as "pressure" coming from one of his "principals," who was a "senior staff member[]," and that he relayed this sentiment to another senior executive at the agency when encouraging that official to waive the required Labor Peace Agreement. App'x at 535. After his call with Kennedy, Percoco contacted Howe to confirm that the state agency would soon reach out to Gerardi "with a different perspective" on the need for a Labor Peace Agreement. *Id.* at 710 (internal quotation marks omitted). The following morning, the agency did as Percoco predicted.

After he resumed his official role in Governor Cuomo's administration, Percoco pressured subordinate state officials to prioritize and release outstanding funds that the state owed COR Development. Percoco also ordered the Director of Administrative Services for the Executive Chamber and employees of the Office of General Services to process a stalled pay raise for Aiello's son, who at that time worked in the Executive Chamber. Recognizing Percoco's role in procuring a raise for his son, Howe encouraged Aiello to send Percoco a thank-you note.

#### **B. Procedural History**

The federal government eventually caught wind of the schemes, and in November 2016, a grand jury indicted Percoco, Aiello, Kelly, and Gerardi for their alleged roles in them. The operative indictment, a second superseding indictment filed in September 2017, charged eighteen counts, eleven of which concern the CPV and COR Development schemes relevant to this appeal. Count Six charged Percoco with conspiracy to commit extortion in connection with both schemes, in violation of 18 U.S.C. § 1951. Counts Seven and Eight charged Percoco with Hobbs Act extortion in connection with the CPV scheme and the COR Development scheme, in violation of 18 U.S.C. §§ 1951 and 2. Count Nine charged Percoco and Kelly with conspiracy to commit honest-services wire fraud during the CPV scheme, in violation of 18 U.S.C. § 1349. Count Ten charged Percoco, Aiello, and Gerardi with conspiracy to commit honest-services wire fraud tied to the COR Development scheme, in violation of 18 U.S.C. § 1349. Counts Eleven and Twelve charged Percoco with solicitation of bribes and gratuities for his efforts in the CPV scheme and the

COR Development scheme, respectively, in violation of 18 U.S.C. §§ 666(a)(1)(B) and 2. Count Thirteen charged Kelly with payment of bribes and gratuities as part of the CPV scheme, in violation of 18 U.S.C. §§ 666(a)(2) and 2, while Count Fourteen charged Aiello and Gerardi with violating the same law by paying bribes and gratuities for the COR Development scheme. Finally, Counts Seventeen and Eighteen charged that Aiello and Gerardi, respectively, violated 18 U.S.C. § 1001(a)(2) by making false statements to federal officers during the investigation into the COR Development scheme.

Percoco, Aiello, Gerardi, and Kelly proceeded to a jury trial, which lasted from January 22, 2018 until March 13, 2018. After the government rested, the trial defendants each moved for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. The district court reserved decision, ultimately denying the motions in an opinion issued after trial. Prior to charging the jury, however, the district court dismissed the Count Eight extortion charge, reasoning in a later-issued opinion that, as a matter of law, Percoco could not have committed Hobbs Act extortion under color of official right, because he did not have an official position in the administration when he received bribe payments tied to the COR Development scheme.

After dismissing the extortion count, the district court instructed the jury. In relevant part, the court stated that to convict the defendants of conspiracy to commit honest-services wire fraud (Counts Nine and Ten) and soliciting or accepting a bribe (Count Eleven), the jury was required to find the existence of a quid pro quo, meaning that a payment was made or

solicited or accepted with the intent that “the payment or benefit . . . be in exchange for official actions.” App’x at 655–57; *see also id.* at 652–53. Though the court instructed that “[a]n official act or official action is a decision or action on a specific matter that may be pending or may by law be brought before a public official,” the court also stated that the quid-pro-quo element would be satisfied if Percoco wrongfully “obtained . . . property . . . in exchange [for] official acts as the opportunities arose.” *Id.* at 652–53.

In addition, the district court instructed the jury about Percoco’s fiduciary duty for the purposes of Counts Nine and Ten, stating that “[a] person does not need to have a formal employment relationship with the state in order to owe a duty of . . . honest services to the public.” *Id.* at 655. According to the district court’s instruction, the jury could find that Percoco “owed the public a duty of honest services when he was not a state employee if” (1) “he dominated and controlled any governmental business” and (2) “people working in the government actually relied on him because of a special relationship he had with the government.” *Id.* at 655.

The jury ultimately found Percoco and Aiello guilty of conspiracy to commit honest-services wire fraud linked to the COR Development scheme (Count Ten). The jury also returned a guilty verdict against Percoco for conspiring to commit wire fraud related to the CPV scheme (Count Nine) and for soliciting bribes or gratuities during the CPV scheme (Count Eleven). The jury acquitted Percoco, Aiello, and Gerardi on the remaining counts, and deadlocked on the charges against Kelly, who later pleaded guilty to one count of

conspiracy to commit wire fraud in connection with the CPV scheme.

The district court sentenced Percoco to a term of 72 months' imprisonment, to be followed by three years' supervised release; imposed a \$300 mandatory special assessment; and ordered Percoco to forfeit funds in an amount later determined to be \$320,000. The district court sentenced Aiello, who was also convicted on all relevant counts during a separate trial for fraud, to a term of 36 months' imprisonment, to be followed by two years' supervised release; imposed a \$500,000 fine, along with a \$300 mandatory special assessment; and ordered Aiello to forfeit funds in an amount later determined to be \$898,954.20.

Percoco and Aiello timely appealed. They now challenge three of the district court's jury instructions, along with the sufficiency of the evidence supporting their convictions; assert that the government improperly amended the indictment by relying on acts Percoco committed when he was not a public official; and contend that the district court erred when it ordered Percoco to forfeit \$320,000.

## II. STANDARD OF REVIEW

We review de novo challenges to the district court's jury instructions, as well as claims of constructive amendment to, or prejudicial variance from, the indictment. *United States v. Roy*, 783 F.3d 418, 420 (2d Cir. 2015); *United States v. Dove*, 884 F.3d 138, 146, 149 (2d Cir. 2018). We also review de novo the sufficiency of the evidence, *United States v. Sabhnani*, 599 F.3d 215, 241 (2d Cir. 2010), recognizing, of course, that a defendant raising such a challenge "bears a heavy burden because a reviewing court must

consider the evidence ‘in the light most favorable to the prosecution’ and uphold the conviction if ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,’” *United States v. Aguilar*, 585 F.3d 652, 656 (2d Cir. 2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); see also *United States v. Harvey*, 746 F.3d 87, 89 (2d Cir. 2014). Finally, when a defendant objects to his forfeiture order in the district court, we review the district court’s finding of facts with respect to forfeiture for clear error and its legal conclusions de novo. See *Sabhnani*, 599 F.3d at 261.

### III. DISCUSSION

#### A. The “As Opportunities Arise” Jury Instruction

The defendants first argue that the district court committed reversible error by instructing the jury that it could convict the defendants of conspiracy to commit honest-services fraud if Percoco had accepted a bribe to take official actions to benefit the payors “as opportunities arose.” The government concedes that, in light of the Second Circuit’s intervening decision in *United States v. Silver*, the district court’s bribery instructions were erroneous; it contends, however, that the error here was harmless. We agree with the parties that the district court’s instruction falls short of the legal standard as clarified by *Silver*, but conclude that the error was harmless.

##### 1. The “As Opportunities Arise” Instructions Were Erroneous.

Federal law criminalizes the use of wire communications to effectuate a “scheme or artifice to defraud.” 18 U.S.C. § 1343. Among the frauds

covered by the wire fraud statute are schemes “to deprive another of the intangible right of honest services.” *Id.* § 1346. When a public official commits “honest services” fraud, he may be held liable on the “theory that a public official acts as trustee for the citizens and the State and thus owes the normal fiduciary duties of a trustee, e.g., honesty and loyalty to them.” See *Silver*, 948 F.3d at 551 (quoting *United States v. Silvano*, 812 F.2d 754, 759 (1st Cir. 1987)). Honest-services fraud is carefully circumscribed, however, and only criminalizes bribes and kickbacks. *Skilling v. United States*, 561 U.S. 358, 409 (2010).

Here, the parties stipulated before the district court that “bribery” for the purposes of the honest-services fraud statute is defined by reference to 18 U.S.C. § 201, which makes it a crime for “a public official” to “corruptly demand[], seek[], receive[], accept[], or agree[] to receive or accept anything of value . . . in return for . . . being influenced in the performance of any official act.” 18 U.S.C. § 201(b)(2)(A); see *United States v. Percoco*, No. 16-cr-776 (VEC), 2019 WL 493962, at \*5 n.12 (S.D.N.Y. Feb. 8, 2019) (noting parties’ agreement to charge jury that the “official act” requirement applies); accord *McDonnell v. United States*, 136 S. Ct. 2355, 2365 (2016) (“The parties agreed that they would define honest services fraud with reference to the federal bribery statute, 18 U.S.C. § 201.”). To prove bribery under § 201, the government must establish a quid pro quo, proving that Percoco “committed (or agreed to commit) an ‘official act’ in exchange for” some benefit. *McDonnell*, 136 S. Ct. at 2361.

Although our Court in *United States v. Ganim* held that that the government can satisfy the quid pro quo



requirement merely by showing that a government official promised to act for the bribing party's benefit "as the opportunities arise," 510 F.3d 134, 142 (2d Cir. 2007), we recently clarified the limits of this theory in light of the Supreme Court's decision in *McDonnell v. United States*. See generally *Silver*, 948 F.3d at 550–58; *United States v. Skelos*, 988 F.3d 645, 655–56 (2d Cir. 2021). In *McDonnell*, the Supreme Court considered the meaning of the phrase "official act" for the purposes of 18 U.S.C. § 201, and determined that the term referred to "something specific and focused that is 'pending' or 'may by law be brought before any public official.'" 136 S. Ct. at 2374 (quoting 18 U.S.C. § 201(a)(3)). It further held that an official act must be "something that is relatively circumscribed—the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete." *Id.* at 2369.

In *Silver*, we considered the impact of *McDonnell* on the "as opportunities arise" theory of honest-services fraud. As an initial matter, we rejected the argument that *McDonnell* "eliminated" this theory of bribery. *Silver*, 948 F.3d at 552. But while we held that *McDonnell* does not "require[] identification of a particular *act* of influence," we also concluded that *McDonnell* does "require[] identification of a particular *question or matter* to be influenced." *Id.* That is to say, the promisor must at least commit "to take official action *on a particular question or matter* as the opportunity to influence that same question or matter arises." *Id.* at 552–53. So the offered "quo" must have "enough definition and focus to be properly understood as promising, in return for some quid, the