State of Louisiana

OFFICE OF

STATE INSPECTOR GENERAL

LOUISIANA PUBLIC FACILITIES AUTHORITY

Report by

Inspector General Bill Lynch

Prepared for

Governor M.J. "Mike" Foster, Jr.

November 2, 1999

File No. 1-99-0101

State of Louisiana

OFFICE OF

STATE INSPECTOR GENERAL

Louisiana Public Facilities Authority

September 21,1999

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Louisiana Public Facilities Authority

The Louisiana Public Facilities Authority, a public trust, failed in its fiduciary responsibility to protect public trust funds by paying severance pay to certain employees and by abusing expense claims.

The LPFA considers itself a non state agency and its funds not public funds. It is contesting in court three laws passed by the Legislature this year affecting its board membership and operations.

Background

A review of operations by this office of the LPFA was requested by Terry Ryder, deputy chief of staff to the Governor. At the time, a study of the LPFA was under way by the Legislative Auditor, who prepared a highly critical report to state Senator John Hainkel issued June 1, 1999.

In 1970, the Legislature approved creation of public trusts, which led to establishment of the LPFA in 1974 as a nonprofit public trust with the state as beneficiary. The Authority is governed by a five-member board which is virtually self perpetuating under its previous status. The Governor appointed persons to the board from a list presented by the board.

Its primary function is to raise capital through tax free bond issues that promote economic as well as governmental development. Numerous commercial ventures, such as shopping centers and hospitals as well as a major student loan program are basic activities of the LPFA.

Members of the Board of Trustees are Thomas Antoon, Alexandria, chairman; Owen Brennan Jr., vice chairman, New Orleans; Lemon Coleman Jr., secretary-treasurer, Pineville; Victor Bussie, Baton Rouge; and Florice Barron, Shreveport. Mr. Brennan and Mr. Bussie have served on the board since its inception.

Allegations

This office received an anonymous list of 17 allegations of alleged wrongdoing and improper activities connected with the operation of the LPFA.

As a result of an investigation into these allegations, it was determined that 15 of the 17 either could not be substantiated or did not merit further consideration. For example, one allegation alleged that the executive director received a $500 monthly vehicle allowance while also being reimbursed mileage and gasoline costs. The agency authorized gasoline costs when his vehicle was used for out of town trips, but no mileage reimbursement was paid. In another case, an allegation that an LPFA official acted improperly in relation to an employee described a minor incident that occurred 10 years ago. It was decided not to pursue the issue.

Fiduciary Responsibility

The LPFA failed to carry out its fiduciary duty to protect the interests of the state by bestowing monetary gifts to employees and paying per diems and other expenses that, in our opinion, did not inure to the benefit of the state.

As a matter of fundamental trust law, trustees are required to administer trust property solely in the beneficiary's interest. Trustees may only incur expenses that are necessary to carry out the purposes of the trust.

The trust indenture, which created the LPFA, states, "the purposes of the LPFA are to promote, encourage and further the accomplishments of all activities which are or may become of benefit to the State of Louisiana and which have a public purpose."

The public trust law authorizes a "reasonable" per diem. However, the trust indenture is more restrictive. The trust indenture states, "The trustees shall serve without compensation, except for per diem payments for attending Authority meetings as the Board of Trustees shall deem appropriate." The board has interpreted the last phrase to permit per diem payments for individual attendance on board business even when the

board is not meeting in formal session. A per diem payment of $300 for each meeting or activity was authorized by the LPFA. This interpretation is subject to dispute.

A review of records for 1998 showed a total of $48,600 paid out to the members. This included attendance at regular meetings, bond closings, conferences and even the execution of contracts.

Mr. Antoon received $22,200 in per diem payments in 1998. This included $5,400 for 18 occasions on which he executed contracts in his Alexandria office. Mr. Antoon stated that he did not denote all of the activities associated with the contracts in which he engaged.

The amount of per diem at $300 and the relatively minor activity of signing contracts in his office sparked much of the criticism concerning the LPFA's operations.

A review of per diem payments to persons serving on other major state boards and commissions shows a wide range from zero to $150, with most authorizing $50 and $75 rates. The Board for Certified Social Worker Examiners has no authorized per diem. The highest at $150 includes the Board of Dentistry, State Employees Retirement System and the officers of the Board of Certified Public Accountants. The Gaming Control Board pays $100 per meeting, the State Bond Commission, which has to approve LPFA bond issues, receives $75, the State Civil Service Commisson, $75, the Board of Trustees for State Colleges and Universities, $50, and the Board of Regents, $50. Legislators receive $97.

In the 1999 session, the Legislature limited per diem for public trust board members to $200.

In addition to the per diem issue, the Legislative Auditor also detailed expense payments for such things as parties, gifts to employees, trip expenses for the wife of one board member, memberships and sponsorships in various organizations which are not state related and severance pay to employees.

Our review showed that Paul Gravel, deputy executive director, who left in April, 1998, received two months severance pay totaling $13,333. There was no legal obligation to pay Mr. Gravel any additional income. He resigned to take another position in Washington, D.C. with LSU. Mr. Gravel's salary at LPFA was $80,000 and became $128,000 at LSU.

James Parks, executive director, said Mr. Gravel asked for help in paying his moving expenses to Washington. He said that he discussed the payment with Mr. Antoon and it

was decided to give him two months pay because of his length of service and a previous reduction in pay.

Severance pay is not part of the normal pay and benefit package for employees in the agency. The Employee Handbook, which is the policy manual, provides for employees to be paid for all earned but unused vacation and sick time. There is no mention of severance pay.

The Legislative Auditor also reported that three employees whose positions were terminated received six months severance pay.

Legal Action

The Legislature adopted three pieces of legislation during the 1999 regular session. One established the maximum per diem at $200, a second required a public trust to run its budget by the Legislative Budget Committee for review and approval, and a third increased the number of board members from five to seven and gave the Governor power to appoint persons of his choosing without having to rely on a board nomination.

In response, the LPFA filed a law suit in 19th Judicial District Court challenging the right of the Legislature to legislate on matters affecting a public trust.

Conclusions:

1. The LPFA failed to carry out its fiduciary responsibility to protect the interests of the state by bestowing monetary gifts to employees and paying per diems and other expenses which, in our opinion, did not inure to the benefit of the state.

2. The LPFA authorized its board members to receive $300 per diem not only for meetings, but for lesser activities such as signing contracts, contrary to the trust indenture.

3. The $300 per diem was not "reasonable" in comparison to per diems for persons serving on other boards and commissions. The amount has been reduced by the Legislature to $200.

4. The LPFA gave two-months severance pay to Deputy Executive Director Paul Gravel totaling $13,333 when it had no legal obligation to do so, which did not inure to the benefit of the state.

Recommendations:

1. The LPFA should limit expenditure of its funds, which we consider to be public, for those expenses and per diems which inure to the benefit of the public and not the private interests of employees and others.

2. The LPFA should seek recovery of the $13,333 paid to Mr. Gravel, the $5,400 paid to Mr. Antoon for per diems on activities not part of a meeting, and those improper expenditures listed by the Legislative Auditor.

Responses:

The LPFA response is attached. Exhibits provided with the response may be viewed at this office or at LPFA.

IG Comments:

On the matter of whether the LPFA is a state agency and its funds are public, the LPFA attempts to have it both ways. For the purposes of its attack on legislation affecting its operational status, the LPFA asserts that it is not a state agency and, therefore, its funds are not public. For the purposes of defending itself against antitrust claims in the U.S. Fifth Circuit Court of Appeals, the LPFA claimed it was immune from the suit because it is a state agency. Whether it is a "state agency" is not at issue in this report. It is our opinion that the LPFA has lost sight of the overriding fact that a public trust and its funds are fundamentally public in

character and not to be doled out in the manner of a private company. The LPFA was created pursuant to a law dealing with public trusts. The Public Trust Law provides, "All public trusts hereafter created or amended under this chapter shall constitute public corporations of the beneficiary." The language of the law at the time the LPFA was created termed it a state agency and it was only through the amendment process by the Legislature that it was termed a public corporation.

For purposes of this report we do not make an issue of whether the LPFA is a state agency or whether its funds are public. We focus on the fact that as beneficiary, the state's benefits are impaired by what we believe are the unreasonable and improper expenditure of its funds.

BL/GL/fs
File No. 1-99-0101

James W. Parks II
Executive Director

H. Patrick Witty
Director of Development

Board of Trustees
Thomas A. Antoon
Owen E. Brennan, Jr.
Lemon Coleman, Jr.
Victor Bussie
Florice D. Barron

August 16, 1999

Mr. Bill Lynch
State Inspector General
State of Louisiana
Post Office Box 94095
Baton Rouge, Louisiana 70804-9095

Re: File No. 1-99-0101

Dear Mr. Lynch:

Thank you for the opportunity to respond to your draft report furnished to us on August 2, 1999 (the "Draft Report"). We commend you on the professional and courteous manner by which your staff members conducted their research, and we appreciate the opportunity to comment on the Draft Report. This response will include general observations about the tenor of some introductory remarks in the Draft Report and detailed information relative to the specific findings and recommendations.

Our initial observation is that the opening paragraph is unnecessarily inflammatory and not reflective of the remainder of the Draft Report. The strong language in this paragraph seems to arise from your conclusion, stated in Recommendation 1, that Louisiana Public Facilities Authority ("LPFA") funds are public. This conclusion is not supported by the court decisions and attorney general's opinions to date. Moreover, the Legislative Auditor stated that: "The state does not appropriate funds to the Authority [LPFA], nor does the state provide any other funding" (see page 2 of the Legislative Auditor's Report dated June 1, 1999 (the "Legislative Auditor's Report") referred to in the Draft Report). Indeed, your conclusion in that respect, unsupported in the Draft Report, appears to have no support other than your statement to that effect.

The most recent ruling by Judge Kay Bates of the 19th Judicial District Court on August 10, 1999 in the litigation to which the Draft Report refers also does not support this assertion. To bring you up-to-date on that litigation, Judge Bates granted LPFA's request for a preliminary injunction enjoining the State from enforcing the three acts approved earlier this year by the Legislature that seek to gain control over the management and operations of the LPFA. A copy of the newspaper article regarding the preliminary injunction hearing is attached hereto as **Exhibit A**. In this article the reporter states:

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Financing Today for a Better Tomorrow

> Bates said her reading of the facts and documents in the case indicate the trust agreement between the LPFA and the state is a contract, and the state cannot unilaterally alter it.

This is exactly what LPFA has been saying since its creation in 1974 by the Public Facilities Corporation, a Louisiana corporation, some four (4) years after the law permitting the creation of public trusts was enacted.

LPFA's Indenture of Trust could not be clearer when describing the rights of the State, the beneficiary of the trust, with respect to the operation, management, and assets of the LPFA. Section 8.2 of the Indenture of Trust provides:

> The Beneficiary shall have no legal title, claim or rights to the Trust Estate, its income, or to any part hereof, or to demand or to require any partition or distribution thereof. Neither shall the Beneficiary have any authority, power or right whatsoever, to do or transact any business for, or on behalf of, or binding upon the Trustees or upon the Trust Estate, nor the right to control or direct the actions of the Trustees. The Beneficiary shall be entitled solely to the benefits of this Trust, as administered by the Trustees hereunder; and at the termination of the Trust, as provided hereinafter, and then only, the Beneficiary shall receive the residue of the Trust Estate.

Attached hereto as **Exhibit B** is a copy of the Petition for Declaratory Judgment and for Injunctive Relief, as **Exhibit C** is the Memorandum of Authorities on Behalf of Plaintiff in Support of Request for Preliminary Injunction, and as **Exhibit D** is the Affidavit of James W. Parks II, all of which were filed on behalf of LPFA in connection with the request for preliminary injunction.

As you will see from these attachments, the existing authorities on the nature of the LPFA and whether its funds are public funds were cited to the court, and the court's ruling on the request for preliminary injunction is in accordance with all of the previous court and attorney general opinions. In Opinion No. 93-87, the Attorney General concluded as follows with regard to funds of public trusts:

> It is the opinion of this office that the funds in question are not subject to the prohibitions contained within Art. VII, Sec. 14, for the reason that such funds are not the funds of the "state or of any political subdivision". The funds in question are the self-generated revenues of the Authority, and are not "public funds".

This conclusion is in line with the decision of the court in *Harris v. Louisiana Public Facilities Authority, et al*, 356 So. 2d 1039 (La. App. 1st Cir. 1977) which stated:

> As to plaintiff's first assignment of error that the court erred in finding that the trustees are a "public corporation" of the State of Louisiana under LSA-R.S. 9:2341(D), we can find no error. The significance of such a finding is that as a "public corporation" the trust is exempt from constitutional limitations applicable to the debts of political bodies or subdivisions of the State which lend and pledge its full faith and credit for the payment therefore.
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> * * *
>
> Thus, the rule seems to be that a public trust as a public corporation that incurs a bonded indebtedness is not subject to the same statutory and constitutional restrictions as are imposed on the state or its subdivisions concerning the incurrence of a public debt because the public fisc is not liable for the payment of such debt.

Additionally, the Legislative Auditor states in his Report that the LPFA "**is not a state agency**" but "is a non-profit public trust and public corporation, which was **created by an Indenture of Trust**." "LPFA raises its funds principally from application and closing fees from the issuance of bonds and from investment earnings. **The state does not appropriate funds to the Authority [LPFA], nor does the state provide any other funding**." "The Indenture of Trust gives the trustees broad powers related to overseeing functions of the LPFA." (See page 2 of the Legislative Auditor's Report).

The courts and the attorney general have consistently agreed that the LPFA is not a state agency and that its funds are not public funds. This conclusion was confirmed by Judge Bates' ruling and should not be the subject of debate here. We, therefore, object to the contrary statements in the Draft Report, and we respectfully request that the Draft Report summarize these contrary views if your view that these funds are "public funds" is retained in the Draft Report.

Additionally, in the first paragraph of the Background section of the Draft Report, you characterize the Legislative Auditor's Report as being "highly critical". We believe that this mis-characterizes the Legislative Auditor's Report when taken as a whole, is superfluous to the Draft Report, and unnecessarily inflammatory.

With regard to the individual sections of the Draft Report, we would like to first address the items raised in the Fiduciary Responsibility section of the Draft Report. Therein you state that in your opinion "the LPFA failed to carry out its fiduciary duty to protect the interest of the state." We

strongly disagree with this opinion. We have operated and will continue to operate the LPFA in a manner that we believe is in the best interest of the State of Louisiana, its businesses, and its citizens. LPFA has a duty to try and make the best resources available to the State and to make financing as easy, fast, and cost-effective as possible. This benefits the State and everyone in it.

The Draft Report questions the authority of the Board of Trustees to set guidelines for when per diem payments will be made. Attached hereto as **Exhibit E** is an opinion from Phelps Dunbar concerning the authority of the Board of Trustees to pay per diem for activities other than Board of Trustees meetings. As you will see, the letter concludes that the Board of Trustees clearly has the power to establish such per diem payment policies and is well within its rights under the Indenture of Trust to provide that per diem payments will be made to Trustees for activities other than attending Board of Trustees meetings. We respectfully suggest that your conclusion that these payments are prohibited by the Indenture of Trust is incorrect.

LPFA Trustees are often called upon to execute documents in connection with bond closings and other matters that need to occur in a relatively short time frame and on particular dates. The Trustees must work to arrange their schedules so that they are available to execute these documents for the benefit of the entities seeking financing or that have obtained financing from the LPFA. It is usually imperative that these transactions take place at a designated time and it is only reasonable to provide for per diem payments to the trustees when they perform duties as trustees of the LPFA.

You also conclude that the $300.00 per diem is not "reasonable." The examples that you cite for other boards are all boards or entities that are political subdivisions of the state of Louisiana and that operate utilizing public funds. This is clearly not the case with regard to the LPFA. As recognized by the courts and the Attorney General, the LPFA is not a state agency and its funds are not public funds. Additionally, members of the Board of Trustees only receive a per diem and are prohibited from receiving any salary or benefits from the LPFA. The Trustees do not receive any retirement, insurance, or other benefits as a result of their service. I believe that Greg Lindsey also obtained information from the Louisiana Workers' Compensation Corporation showing that they pay board members a $500.00 "board fee". We suggest that LWCC is a far better entity to compare to LPFA than the political subdivisions listed in the Draft Report. LPFA is even further removed from the State than LWCC because certain obligations of LWCC are guaranteed by the **full faith and credit of the State of Louisiana.** LWCC was created and funded initially by the legislature and the legislature is only now trying to make it more independent and, if certain conditions are met, remove the state guarantee from some of its obligations. Through LWCC operations, state funds are potentially at risk. **No state funds are at risk through the operations of the LPFA.** LPFA cannot, therefore, be deemed more like a state agency than LWCC.

Moreover, with respect to per diem, the LPFA requests that you include the fact that a state district judge has issued an injunction against the enforcement of the legislation in which the legislature established a $200.00 per diem. In the middle of page three of your draft, you make the unqualified statement that the "Legislature limited per diem for public trust board members to $200," but do not state that a preliminary injunction has been issued barring enforcement of that legislation. In the middle of page four, you state that in response to this and other legislation, the LPFA filed a suit, but you do not state that the state district judge ruled in LPFA's favor, granting a preliminary injunction. And finally, on page five of your report, you make the unqualified statement that the amount of per diem originally set by the LPFA "has been reduced by the Legislature to $200," without stating that the enforcement of this reduction has been preliminarily enjoined by the state district judge. In order to be accurate and complete, your report should include this additional information.

The Draft Report also objects to the LPFA having paid two months severance pay to Paul Gravel, who was then the Deputy Executive Director and who had previously been the Executive Director of the LPFA. Mr. Gravel had been employed by the Authority for almost 13 years. As part of the budget cuts implemented in 1994, the Board of Trustees reduced Mr. Gravel's salary from $83,500 to $70,000. Mr. Gravel made this sacrifice to help LPFA drastically reduce its operating expenses which has put us in the position where LPFA has earned an operating profit for the past two years. Mr. Gravel's salary in 1994 was $83,500, in 1995 was $70,000, and in 1996 was $70,000. His salary was increased to $80,000 for 1997 and remained there until he left the LPFA. Mr. Gravel maintains numerous contacts with parties in Louisiana and Washington, D.C. that are invaluable to the LPFA and our clients. Mr. Gravel agreed to assist LPFA and its clients even though he was moving to Washington, D.C. The Board of Trustees had a fiduciary duty to ensure that Mr. Gravel was available to LPFA and its clients for this assistance. For this reason, Mr. Gravel was paid a severance fee in the amount of two months salary, totaling approximately $13,333. This is far less than the more than $31,500 in salary previously given up by Mr. Gravel in an effort to assist the LPFA. LPFA does not have any program such as the state DROP program whereby employees can retire or leave their current position and still work for or provide benefits to the LPFA. The only mechanism available to LPFA is to pay severance pay. Additionally, it is not uncommon for businesses to pay former chief executives in order to have these chief executives available and willing to assist with ongoing problems and operations after they leave the company. The Trustees had a fiduciary duty to be certain that Mr. Gravel was willing and able to assist LPFA and its clients in the future and to reimburse Mr. Gravel for a portion of the salary that he had previously given up for the benefit of LPFA. Having Mr. Gravel available to LPFA and its clients is clearly a benefit to the state of Louisiana, its businesses, and its citizens.

At the end of the Draft Report, you make two recommendations. With regard to Recommendation 1, as noted before, LPFA funds are not public funds and in order to accomplish the

purposes of the LPFA their expenditure cannot be so restricted. Furthermore, LPFA has properly expended its funds. Funds were not spent for the private interest of employees or others. Even though LPFA funds are not public funds, the Board of Trustees and management of LPFA make every effort to safeguard these funds and to spend them in a prudent and efficient manner. As shown in Appendix A to the Legislative Auditor's Report, LPFA has dramatically reduced its operating expenses and has for the past two years posted an operating profit. LPFA continues to work to provide the best and most cost-efficient method for borrowers to receive tax exempt financing in the state.

For the reasons stated above, the expenditures listed in Recommendation 2 were proper and in the best interest of the LPFA and the state. LPFA should not, therefore, seek restitution for these proper payments.

Once again, thank you for the opportunity to respond to the Draft Report. We hope that these comments might cause you to reconsider some portions of the Draft Report. Please contact me if you have any questions regarding the information herein or need any additional information or clarifications from me.

Very truly yours,

LOUISIANA PUBLIC FACILITIES AUTHORITY

Thomas A. Antoon /gs

Thomas A. Antoon