





THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE  
BOSTON, MASSACHUSETTS 02108

MARTHA COAKLEY  
ATTORNEY GENERAL

(617) 727-2200  
www.ago.state.ma.us

December 5, 2007

Dr. John William Poduska, Sr.  
Chairman of the Board of Directors  
Citi Performing Arts Center, Inc.  
270 Tremont Street  
Boston, MA 02116

Re: Citi Performing Arts Center

Dear Mr. Poduska:

Under its authority to “enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the administration thereof,” (see M.G.L. c. 12, s. 8), the Attorney General’s Office, through its Non-Profit Organizations/Public Charities Division (the “Division”), initiated an inquiry regarding certain actions of Citi Performing Arts Center, Inc. (formerly known as the Wang Center for Performing Arts, Inc. and hereinafter “Citi Center”) involving chief executive compensation and related party transactions. Citi Center, together with its subsidiaries Wang Theater, Inc., Tremont Theater, Inc., and Wang Center Productions, Inc., are each Massachusetts public charities and, as such, subject to the Division’s enforcement authority.

In particular the Division has reviewed matters related to: (i) compensation of Citi Center’s chief executive officer, Josiah A. Spaulding, Jr.; and (ii) payments by the Citi Center to (a) Joyce Spinney, Mr. Spaulding’s wife, (b) the public relations firm of Kortenhaus Communications, whose principal is Lynne Kortenhaus, a Citi Center director, and (c) the law firm of DLA Piper, whose managing partner in the Boston office is Elliot Surkin, also a Citi Center director. Our investigation comprised a review of certain Citi Center documents and interviews with you, John Cook, who serves as a director and treasurer; and Elliot Surkin, who serves as a director, clerk and primary legal counsel.

Direct or indirect payments to these persons or firms, if in amounts in excess of fair market value for the services rendered, could constitute a breach of trust in the administration of charitable funds. What constitutes fair market value for personal or professional service arrangements, such as the ones addressed herein, are among the most difficult issues that boards and regulators must address. While the use of market



comparables is appropriate and helpful, the wide range of evidentiary factors available and the intrinsically unique characteristics of such services, means that identifying precise comparables is difficult. As a result the Division is guided by criteria and procedures similar to those employed by the Internal Revenue Service pursuant to its so-called Intermediate Sanction Regulations (*see* Reg. §53.4958-6C), which look to the process utilized by the charitable entity in establishing the amount paid. More specifically we look for evidence of: (i) governing body involvement; (ii) use of independent sources of information and advice; (iii) lack of undue influence exerted by the compensated person; (iv) disclosure; and (v) concurrent documentation.

Based on our limited inquiry and for the reasons set forth hereinafter, we have concluded that the process utilized by the Citi Center board in approving executive compensation and related party transactions, while evidencing weaknesses in certain procedures and documentation, was within the range of what we would expect of the governing body of a public charity. As such, no further investigation into the fair market value of the services rendered is warranted. This conclusion is based solely on the information submitted to us. While this letter will end our inquiry into these matters, we have made certain recommendations with respect to board procedures and documentation which you have agreed to implement.

Our review of the matters addressed in this letter is limited to a legal assessment of whether the evidence establishes a violation of the Commonwealth's public charities laws. The Attorney General does not express, and nothing in this letter or our findings should be construed to express, any opinion on the business judgments of the Citi Center board or management including, without limitation, programming decisions.

## **I. Executive Compensation**

During the five year period commencing with fiscal year 2002 (the first year of his five year contract), Citi Center's chief executive officer, Josiah A. Spaulding, Jr., was compensated in the following amounts: FY02 (\$513,000), FY03 (\$509,026), FY04 (\$504,000), FY05 (\$504,000) and FY06 (\$409,000). These amounts have been fully disclosed in Citi Center's annual filings with the Division. In addition, on July 21, 2006 Spaulding received a payout of his deferred stay bonus of \$1,238,000, which amount includes interest accrued at 10% per annum over the five year contract period.

Records of Citi Center indicate that as early as 1997 the importance of establishing a process for making executive compensation decisions was well understood. On May 21, 1997, the finance committee of the board first created a compensation subcommittee, which later became an independent standing committee of the board as a result of a bylaw amendment adopted by the full board of directors on September 24, 1998. At that meeting, the then chairman, David D'Alessandro, in a prepared presentation, recognized Internal Revenue Service, as well as media, scrutiny of executive compensation matters and emphasized the importance of justifying whatever compensation decisions were made. After noting that the IRS permitted the use of for-profit comparables, he described executive compensation arrangements in certain for-

profits, including an arrangement involving annual compensation of \$750,000 plus a multi-million dollar equity piece, which he considered comparable to the Citi Center. Elliot Surkin, Citi Center's counsel and a member of the compensation committee, has advised us that his firm consistently reminded the board of their obligations under Intermediate Sanctions Regulations as well as guidelines suggested by the Massachusetts Attorney General Board Members Guide.

At a meeting held on May 3, 2001,<sup>1</sup> the compensation committee approved a five year employment contract with Spaulding (the "Spaulding Contract"). The Spaulding Contract, which became effective on June 1, 2001 and expired on May 31, 2006, provided for an annual base salary of \$304,000, an annual performance bonus of up to \$200,000 and a deferred stay bonus of \$200,000 per year. You have advised us that the base and performance amounts under the Spaulding Contract were identical to those currently in place immediately prior thereto. Subject to certain limited exceptions not here relevant, the deferred stay bonus, which had not been in effect prior to June 1, 2001, was payable, with accrued interest at 10%, only at the end of five years and only if prior thereto Spaulding had not resigned or been terminated.

In reaching its 2001 decision on Spaulding's compensation<sup>2</sup>, the compensation committee had before it at least two studies regarding market compensation: (i) a January 2001 report prepared by AMS Planning and Research Group for the Performing Arts Centers Consortium<sup>3</sup> (the "2001 AMS Report") and (ii) a 1999 Compensation Survey prepared by Price Waterhouse Coopers and addressed to the Wang Center (the "1999

---

<sup>1</sup> Citi Center states that it has been unable to locate minutes for the May 3, 2001 compensation committee meeting. Counsel has stated that he had made a diligent search, but records may have been lost after he moved from the now dissolved firm of Hill and Barlow to his current firm, DLA Piper. Other evidence indicates that the meeting was held and the Spaulding Contract was approved by the committee. The meeting agenda, which we have reviewed, included action items to approve "incentive/retention compensation bonuses for key employees" and "the new President & CEO contract." Surkin also stated that he had participated in the meeting as a member of the compensation committee, described the committee's deliberations in approving a new contract for Spaulding, including a \$200,000/year stay bonus, and reported to a July 12, 2006 executive committee meeting that Mr. Spaulding's "recurring annual stay bonus" had been properly authorized and approved by the compensation committee. Indicative of its familiarity with stay bonuses, (i) the 1999 PWC Report (as later defined herein) noted stay bonuses as a portion of for-profit executive compensation packages and (ii) compensation committee minutes of May 8, 2002, in which the committee authorized Mr. Spaulding to set stay bonuses for other key employees, state "it was noted by the committee that in the long run it was less expensive to do retention bonuses than to pay a consultant to find new employees." Finally, Citi Center financial statements filed with the Attorney General since 2004 have noted that "the compensation committee designed the retention program to maintain continuity of key positions with the organization with guidance from compensation consultants."

<sup>2</sup> We were advised that although Spaulding was and remains a member of the compensation committee, he has neither participated in nor been present at any compensation committee discussions or actions involving his compensation.

<sup>3</sup> The Performing Arts Centers Consortium, of which Citi Center is a member, is a consortium of approximately thirty of the largest performing arts centers in the country.

