

## ***THE STORY BEHIND THE NEW YORK CITY GREENGROCER CODE OF CONDUCT A Conversation with Patricia Smith***

by Mathew Bodie

On September 17, 2002, New York State Attorney General Eliot Spitzer announced with some fanfare the creation of a Greengrocer Code of Conduct. The Code established a set of minimum employment terms for the workers at New York City greengrocers – small, generally family-run grocery stores. An investigation by the Attorney General's Office had revealed widespread violations of basic wage and hour requirements at many greengroceries. Workers at these stores were making between \$200 and \$300 per week for 72 hours of work. While the investigation initially led to settlements with a small subset of individual stores, the problem seemed much too large for such a piece-meal approach. Thus, the notion for the Code of Conduct was borne. Negotiating with groups representing the greengrocers and their employees, the Attorney General's Office developed a Code of Conduct for the industry. The Code set forth the minimum required wages, overtime pay, breaks, and even vacation and sick time. If a greengrocer agreed to adopt the terms in the Code, the Attorney General's Office would agree not to pursue any prior violations. About 200 greengrocers have now signed on to the Code.

Patricia Smith is the Assistant Attorney General in charge of the Labor Bureau at the New York State Attorney General's Office. Ms. Smith has served in the Labor Bureau since 1987, beginning as section chief and later becoming deputy bureau chief. Before coming to the Attorney General's office, Smith was a staff attorney and later Assistant Litigation Director at the Legal Services Organization of Indiana. She is a graduate of Trinity College in Washington, D.C. and New York University School of Law. Along with Assistant Attorney General Terri Gerstein, Ms. Smith represented the Attorney General's Office during the negotiations over the Code.

Hofstra Law Professor Matthew Bodie spoke with Patricia Smith last August at the Attorney General's Manhattan offices.

### **Q: What is the role of the Labor Bureau within the Attorney General's office?**

**Patricia Smith:** Well, the Labor Bureau's existed in some form or fashion for at least thirty years. It really started out as a Bureau whose primary job was to represent the Workers' Compensation Board, which is still one of our functions. And then I think probably at the very beginning of the Abrams administration, it was consolidated in such a way that it also then took on the job of specifically representing the New York State Department of Labor, which had generally been represented just by the Litigation Bureau. And then there was a sort of a separate bureau, the Unemployment Insurance Bureau; they're federally funded and their job is to represent the Unemployment Insurance Board in proceedings. So we basically have three sections: The Unemployment Insurance section, which can only do unemployment work; the Workers' Comp section; and then the other section, which we call the General Labor section, does everything else. That section does all the affirmative work, represents Labor Department in all proceedings which involve enforcement of the labor law, and enforces the right-to-know law and the jury duty law. It's got an incredibly broad task.

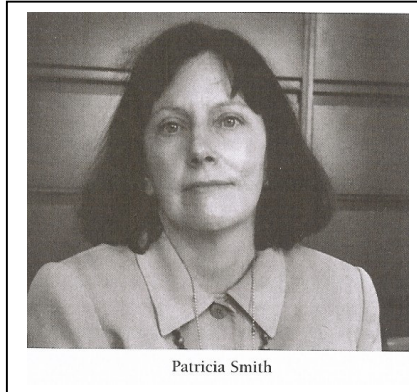
### **Q: How does that work in terms of actual cases? Does a person go to the Department of Labor and then, if they have a case, it eventually ends up in your office?**

**PS:** No. If a person has a case, they can either come here and we'll look at it -- I mean, the cases that you hear about that we do are not on referral from the Labor Department, but we actually do them ourselves. We use the executive law jurisdiction, which allows us to basically enjoin any repeated violation of law. So we have that type of a jurisdiction. And usually when we represent the Labor Department, it's in a situation where the Labor Department's being sued. Someone's appealing a decision of the Labor Department -- usually it's employers appealing decisions of the Labor Department. Or it's a challenge to the Labor Department's separate enforcement of the law. We get a lot

of preemption challenges to the Labor Department, a lot of preemption challenges to the state labor laws, and we would handle that.

**Q: Are those primarily ERISA or --**

**PS:** They used to be primarily ERISA. But these days, they are primarily NLRA challenges and Section 301 challenges. We've got at least two or three of them pending right now. Including the NLRA challenge to what we call the Union Neutrality Law, the law that prohibits the use of state funds to encourage or discourage unionization. There's a challenge in the Northern District that the law's preempted. We're defending that right now.



**Q: Do you work with any of the other agencies that handle employment law cases, like for example the State or City Human Rights Commissions?**

**PS:** We don't really do work with the Human Rights Commission; that would be the Civil Rights Bureau. Our jurisdiction is really more in wage and hour labor law, health and safety, not civil rights. We do work a lot in conjunction with the National Labor Relations Board, interestingly enough, because it's often true that when people sort of organize and come in a group to us, they often end up an unfair labor practice charge against their employer. And so it's often true that there's a case pending in this office for labor law violations, wage and hour violations and a case pending at the Board for something else. So we actually do a lot of cross-information back and forth with the Board.

**Q: And how is that handled? Is it just informal ties?**

**PS:** It's just informal ties, yes.

**Q: Are there any other federal agencies that you work with regularly?**

**PS:** We have a very good relationship with the U.S. Department of Labor with their labor standards folks.

**Q: How does that work? Because I know a lot of the New York standards are mirrors of the federal standards. So if someone has a minimum-wage violation claim, is it up to you whether you handle that or not or is it up to the Department of Labor? How are those issues handled?**

**PS:** If somebody goes to the Department of Labor, they'll handle it. We're not required to enforce the law like the labor departments are, where we use our discretion and have sort of an informal decision-making process about where we want to put our resources. Our resources are, as you can imagine, very limited. We talked about the general labor section; that does everything, including probably about -- at least 50% of their work is defending the Labor Department. And it used to be, when I first came here, 95% of their work was defending the Labor Department. And we only have eight attorneys, which means we only have four attorneys to deal with affirmative cases that we do. The delivery person case, the greengrocer case, the day labor cases, all these cases; we have the functional equivalent of four people. Because all those people who are doing those cases also are carrying a case load defending the Labor Department in various ways.

**Q: Do you have any in-house investigators?**

**PS:** Not assigned to the Labor Bureau. We have an investigations division here that primarily assists the criminal division. And so we have access to them, but no one is actually assigned to us that we can determine what they do.

**Q: What are your responsibilities as Assistant Attorney General in charge of the Bureau?**

**PS:** Well, to supervise the work of the Bureau, which would include all those areas that I talked to you about. And to basically make the priorities and set the affirmative agenda that the general labor section does.

**Q: Do you work with the Attorney General on setting that agenda?**

**PS:** Yes, the Attorney General meets with every bureau that has an affirmative agenda every year to set priorities.

**Q: And I noticed that the Labor Bureau is in the division of State Counsel rather than the division of the Public Advocacy; is that because of the work with the agencies that you do?**

**PS:** Right. Historically, that's because we evolved out of representing the Workers' Compensation Board. There are two bureaus in the AG's office that do both affirmative and defensive work: the Labor Bureau and the Environmental Protection Bureau. Just like the Labor Bureau, the Environmental Protection Bureau has a client, DEC, but they also have their own affirmative agenda. They happen to be in the Bureau of Public Advocacy; we happened to be in the Bureau of State Counsel and it's just historical accident. I mean, there's really no –

**Q: There's no effect of that.**

**PS:** Well, we report to different people. I have a different supervisor than the bureau chief of Environmental Protection does. But I think it's just historical accident that one ended up in one bureau and one ended up in the other bureau.

**Q: You don't think it has any effect in making maybe your responsibilities in defending the agencies maybe more important to your supervisors?**

**PS:** Well, no, I don't think it has. I think that it does have sometimes have an effect on resources, because when we compete with resources, we're competing with people who are defending the state, the other bureaus in the State Counsel bureau, as opposed to the affirmative agendas. So I'm not going to say it doesn't have any impact, but it has sort of an external impact more than an internal impact.

**Q: Do you see any possibility that the affirmative side will grow over time?**

**PS:** The affirmative side has grown. When this administration came in, affirmative cases were about 10% of our case load and now they're 50% of our case load. So will it grow? It can't really grow any more than it's grown over the last four years unless we get more resources, because we have to defend the state.

**Q: I wanted to talk now specifically about the greengrocer agreement. First of all, before we get into the specifics of the code of conduct, I was wondering if there's any definition of a greengrocer that you could provide.**

**PS:** Well, actually, the code has a definition of a greengrocer, which in hindsight, I might have made it a little different. But the definition of a greengrocer in the code is "a small, retail food store under 15,000 square feet." But realistically, if you want to think about what a greengrocer is, it's sort of a New York City phenomena, right? They started out as basically corner produce stores and that's why we call them greengrocers, because they sold primarily produce, although they sell other things. In the last five years or so, they've sort of evolved -- many of them -- into not just selling produce and some staples, but having salad bars. And so what you find, in Manhattan, is that many of the greengrocers are sort of produce store-combination-delis. If you're in Queens in Brooklyn, they tend to be more the traditional produce/staple stores. But they're small stores in neighborhoods. And again, they're not quite grocery stores, but they focus a lot on the produce.

**Q: Has that definition in the agreement excluded anyone or included anyone that you --**

**PS:** Well, it probably technically includes bigger grocery stores that we had really not meant to include.

**Q: I see. And is that a problem of them wanting to get in or not wanting to get in?**

**PS:** No, not particularly, it's just sort of a problem when we say, "Well, how many do we have and how many people are eligible to sign up?" It turns out that my mathematical sense is not very good and 15,000 square feet is a lot bigger than I thought it was. We had no mathematicians at the table when we negotiated this. Or architects.

**Q: So it has an effect on the statistics, but not really on the operation of the code.**

**PS:** Right.

**Q: I know this investigation began several years ago, right? I know there were some settlements in 1999. Maybe if you could say a little bit about how these investigations started.**

**PS:** Well, the investigations started as most of our investigations start, with individuals simply coming to our office. Now, it was true -- especially in 1999, it's a little less true now. But it was true then that when workers had a problem, it was not the first place they thought to go, to the Attorney General's office. So generally, most of our campaigns are started in conjunction with an advocacy group, a worker advocacy group. It could be one of the worker's centers, it could be a union, it could be an ad hoc group that got together within an industry.

In this particular case, Local 169 of UNITE and the Community Labor Coalition of the Lower East Side in conjunction with one another had started a sort of a greengrocer campaign in the Lower East Side where they were going around trying to improve the working conditions of the greengrocers. And they started bringing cases to us, when they saw that there were wage and hour violations. So we started on the Lower East Side investigating stores. And then we had a lot of early cases in Tribeca, and it started to sort of evolve up north, up Fifth Avenue.

And as we got more and more cases, we started to see a pattern. I mean, the labor violations in the stores were almost identical, which was that the workers worked twelve-hour days, six days a week and they got somewhere between two and three hundred dollars a week. They were paid by the week for 72 hours and twelve-hour days, six days a week. It was almost -- every store was the same. When we started to see this sort of pattern and we saw that every store that we had looked at had the same pattern and the same violations, that's when we said, "There's a real pattern that's going on here."

When we saw that pattern, the first thing we did was that we tried to broaden our strategy to an employer education strategy. And the reason that we did that was the other pattern that we saw was that the employers were primarily -- although far from exclusively -- Koreans, immigrants themselves. The workers tended to be Mexican immigrants -- although, again, not exclusively. So what you saw was two immigrants groups working together and we sat down with members of the Korean community who had said to us was that one of the problems was that the owners did not understand what their real obligations were. So we took that at face value and we set up, in conjunction with the Korean Produce Association, educational seminars for employers. And we went there, we had translators and we really tried to educate the owners as to what their obligations were. And we saw some movement with that education program, which has been incorporated into the code. But not enough to satisfy us.

And we kept doing the investigations and requiring the employers to pay the back wages, which were costly for the employers. But it was not particularly efficient for us, especially given our resources to do this one case at a time, given how many greengrocers there were in the city. So the idea of the code was that we would be able to come up with an arrangement that everyone would benefit from. The workers would benefit, because if your employer joined the code, you wouldn't wait until we got around to investigating that store; they'd come into compliance now and they would agree to monitor. So the workers benefited from getting the minimum wage now and not as opposed to some time in the future. The employers benefited because they didn't have to worry about us doing a back wage investigation. So long as they remained in compliance, that would save them money. And we benefited, because we would be able to get into compliance a larger group of people faster than we would be able to do going investigation by investigation. I mean, given the fact that all these stores are independently owned and they're small -- to have fifteen workers in any of these stores is a large greengrocer.

**Q: What's the corporate structure? Are these small partnerships?**

**PS:** No, they're generally small corporations owned by the family.

**Q: And there individually is a proprietor, a single proprietor?**

**PS:** Generally it's a family. You know, a husband and a wife that owns it. I mean, occasionally you'll see -- a family will own maybe two or three, but generally it's just one store. They own one store.

**Q: So I can imagine it might be also hard in pursuing back wages, to some extent. It seemed like you were successful in getting settlements at first. And that's one thing having worked at the NLRB, I know it can be tough sometimes, when there's a family structure, to work out a settlement. Was that a problem at all?**

**PS:** No, it really wasn't a problem. Perhaps in a few cases. Because the violations were there. I mean, we had a very strong case. And every time we investigated one of these stores, we made sure that before we sat down to negotiate, we had all the evidence; we were ready to file the lawsuit. So it's not as if the owners had really any legal defenses. And we were mindful that we didn't want to put owners out of work; it wouldn't be good for the owners, it wouldn't be good for the workers.

So when we did structure the settlements, we looked carefully at their economic situation. And most of our settlements are structured over a couple of years, so that they didn't have to come up with all of the money at the beginning, but they could actually -- you know, we usually gave them two or three years to pay out. If we had filed the lawsuit, we would have been entitled to damages of 25%. We gave them an incentive to settle that we usually settled for the underpayment and not the 25% damages.

So they had an incentive to settle; they had very few legal arguments to defend the lawsuit and we were going to be mindful of trying to keep them in business.

**Q: So how many settlements did you have before the code was developed?**

**PS:** I don't know; ten, twelve, fifteen, twenty -- I mean, we had a lot.

**Q: And in developing this code, were the organizations that you mentioned earlier involved with developing the code?**

**PS:** Who was involved in developing the code was the Korean-American Association, and they basically represented the interest of greengrocer owners; the Attorney General's office; and then there were certain representatives of the workers. Gerry Dominguez from Casa Mexico, who was one of the original organizers with the [Local] 169 campaign, was involved. Colleen Gardner, from the state AFL-CIO -- she's director of organizing and community services -- she was involved. So those were basically --

**Q: They weren't the direct collective bargaining representatives of any of these employees, is that correct?**

**PS:** No, they were not. They did not participate as a collective bargaining representative, but simply as a voice for the workers.

**Q: Casa Mexico, what organization is that?**

**PS:** It's a worker advocacy group, basically, that deals with primarily Mexican workers.

**Q: And you mentioned the Community Labor Coalition of the Lower East Side, is that a similar advocacy group?**

**PS:** That is a similar advocacy group, yes. That sort of deals with the Lower East Side. They were not actually at the table when it came to the code of conduct.

**Q: In terms of the Korean-American Association, they were representing the owners -- again, was this unofficial?**

**PS:** It was not like a collective bargaining; it was just a group of people sitting down. And since -- as I said, since primarily the owners are Korean, the Korean-American Association is sort of the largest of the organizations. It represents the whole Korean community. The head of the association is elected by vote of anyone who's Korean in New York City -- anyone who's Korean in New York City can vote in this election. It's an interesting structure. And the head of the Korean-American Association at the time, Andrew Kim, was not a greengrocer owner. So he had two greengrocer owners there and they were sort of -- besides him, they were representing the Korean-American Association.

**Q: Were there any employees there as well, alongside of the advocacy groups?**

**PS:** No, no; they were speaking for the employees.

**Q: How did these negotiations take place? Was it something that was kind of informal over time or did actually people sit down in a room and hammer this out?**

**PS:** No, we sat down in a room. The first thing that we did was we talked to the worker advocacy groups. Both Casa Mexico, which is not a union, and the AFL-CIO, which is -- you know, is an organization of unions. And we talked about the idea of the code and what the code would do and how a code would benefit the workers.

Then we sat down with the Korean-American Association and talked to them about it. And then when we all at least agreed that we would try to see, we all sat down together. And we had, I don't know, weekly or biweekly meetings that went probably nine months that the code was negotiated, over a probably nine-month period.

**Q: And were the investigations continuing at that point?**

**PS:** Yes. The investigations continued through most of that point. There did become a point when we were negotiating the code where we suspended the taking of any new cases as sort of a sign of our good faith to the Korean community. All the pending investigations, the ones that had already started, they continued on.

**Q: Could you explain briefly what the terms of the code are. Or what exactly is the code -- is it a settlement agreement, is it a non-binding kind of aspirational agreement?**

**PS:** No, actually, there are binding terms and, in order to make it binding on the people who sign onto it, we actually have them sign an assurance of discontinuance under the executive law, which is a binding agreement. And the code now is a two-year code, so we're about halfway through.

And what it does is that the owners who sign onto the code agree to abide by the terms of the code, which I'll get into in a minute. The Attorney General's office agrees that, so long as they're in compliance with the code, we will not investigate their past violations of the labor law. So that's sort of the binding part; they agree to remain in the code, we agree, during that period, we're going to be hands-off.

The terms of the code are that the employers must comply with the labor law, New York State labor law, and which is sort of laid out in great detail in the code. They must also give workers some benefits which are not required by the labor law. They are required to give them a week's paid vacation and two to three paid sick days, depending on how many years a worker has been there.

There are some aspirational parts, also, of the code. For instance, one aspirational part is although they're only required to pay minimum wage, there's a provision in there that says that it's good practice that when employees have been there for a while, to give them raises and to raise them above the minimum wage. So there are aspirational parts, but the binding parts are complying with the law and giving those benefits.

The part, also, that's binding in the code is that employers must subject themselves to unannounced monitoring by the monitor, which we have actually hired a monitoring company.

**Q: What company is that?**

**PS:** A & L Group, Incorporated.

**Q: What type of company is it?**

**PS:** It's a monitoring company; they generally monitor in the garment industry. You know, monitoring companies have sort of evolved out of primarily the garment industry and codes of conduct in the garment industry, which I think are very different than this code of conduct.

**Q: I'm not really familiar with those. Are those also legal agreements?**

**PS:** No, they're really not. They're more aspirational and they're more -- I think the difference and it took us a while to sort of work through with the unions the concept of a code of conduct, because their experience in the garment industry is not good. But I think that the difference in the two codes is, in the garment industry, you have major manufacturers who sort of subcontract out to separate companies the making of the goods, agreeing that they will make their subcontractors be monitored. So that the subcontractors haven't actually agreed to anything.

**Q: Right. So at Kate Spade, I think I remember hearing something about --**

**PS:** Yeah, Kathy Lee, Nike, they all have their subcontractors monitored. Here, it's the actual people who are employing them who are coming forward and agreeing to comply with the law and be monitored. And our agreement is with them. So I think it's a very different type of situation, where the individuals are agreeing to be monitored and agreeing to comply and getting a benefit, as opposed to -- you know, it's a condition of your getting the job that you're supposed to be complying with the law, but it's not necessarily in your economic interest to do so. So you have much more of a reason to hide things from the monitors than we do here.

**Q: So does the monitor have a set number of greengrocers that it must visit?**

**PS:** Yes. The monitor is supposed to visit each of the greengrocers and because of the state -- frankly, because of the state budget crisis, it took us much longer than we anticipated to get the monitor approved and to get the contract down. And so the monitoring started a few months ago and they're monitoring -- they're probably monitoring three greengrocers, four greengrocers a week. And by the end of the code of conduct, everyone will be monitored at least once.

**Q: How many are signed up right now?**

**PS:** About 200.

**Q: Has anyone signed up and then dropped out, or --**

**PS:** No, no one has signed up -- we have, I think, one greengrocer who signed up and subsequently, when we went to monitor then, were not in business any more. There was another corporation there, so it hadn't signed onto the code. But, no, we haven't had anyone drop out and we've not had the need -- well, we have a provision that -- because one of the things we wanted to do with the monitoring is that we wanted to assure the owners that we weren't trying to catch them. Right? There was no trick here. That we wanted to -- the monitoring was to make sure that they were in compliance and to give them assistance into coming into compliance if they weren't.

And what we found with the monitors is that -- in the reports that we've gotten so far, is that while they're in compliance with minimum wage and overtime, sometimes there are issues like breaks. There are issues with record-

keeping – in other words, people are paid for twelve hours a day, but they don't sign in, they don't sign out. So we don't know if they're really working twelve hours or 12 1/2 hours or what they're working.

So there are issues and the monitors have basically given the people advice and then they're supposed to go back after two or three weeks to re-monitor to make sure that the violations have been taken care of.

**Q: So how many violations have been discovered up to this point?**

**PS:** I'd say that the main violation that's been discovered is the record-keeping issue. That –

**Q: That's part of the terms of the code, right? That they have to keep payroll records, is that right?**

**PS:** They keep payroll records; that's not the problem. They don't keep time records. So when they pay somebody for ten hours, and they say, "Well, you know, their shift is from 8 to 7," or whatever their shift is; that's a ten-hour shift. But the monitors don't know whether they worked ten hours or 10 1/2 hours, because sometimes they have to work longer. So they really haven't understood the concept that, you know, you don't have to have a time clock. All you maybe have to do is have a sign-in sheet, where somebody signs in at the time they start and signs out. So that we have a sense that they're getting paid for ten hours, they worked for ten hours and not twelve hours.

It's not the biggest violation that we've ever seen, but it's something that I hadn't really anticipated that it would be difficult for them to grasp the concept of that. I mean, I've had a couple greengrocers call me and say, "Do I need to buy a time clock?" "No, you need to keep records of when people come and when people leave and pay them on the basis of that."

**Q: Is this something that the workers have complained about all? That they're working longer than they're getting paid for or --?**

**PS:** No, not necessarily. I think there was one case that I remembered where the employer was taking credit for a half-hour break and the workers were saying they didn't always get their break and we had to talk to the employer about that.

**Q: I saw from the code that the monitor reports to a committee. A code of conduct committee?**

**PS:** Well, actually, no, the monitor reports to us. The monitor reports to the AG's office. The code of conduct committee is there if somebody really wants to argue about something in the monitor report or wants to -- I don't know, "appeal" is not really the right word.

**Q: Discuss?**

**PS:** Yes, discuss. The committee is available for that.

**Q: And who is on the committee?**

**PS:** A representative of the Korean-American community, a representative from Casa Mexico and a representative that the Attorney General picks. Our representative is Carla Meyer, who teaches labor law at New York Law School. Years ago she was actually the bureau chief here. Casa Mexico has a representative. And frankly, we're having -- not an issue, but the Koreans have not appointed someone and there's been a changeover in the leadership and we're still working with them on getting their representative appointed. But we haven't really had occasion to date to call the committee, because we haven't really haven't had any appeals from the monitors' reports.

**Q: So this is really an ongoing responsibility for your office to monitor this agreement.**

**PS:** It is. It is an ongoing responsibility and, you know, we are doing that. And our campaign is not limited now to the code of conduct. We have other investigations of greengrocers that have not signed to the code. I mean, one of the reasons that we wanted the code was so that the monitor monitors and we hope that that's the group of folks that, you know, we don't have to really worry about so much. And then we want to go on and keep our investigations going of the other greengrocers.

**Q: Can you say how many investigations are going on right now?**

**PS:** We probably have five or six ongoing greengrocer investigations.

**Q: Okay. And those would just be handled in the traditional way of trying to get a settlement of back wages.**

**PS:** Right, right.

**Q: If a greengrocer is being investigated and says, "Oh, well, maybe now I want to join the code," is that possible?**

**PS:** No, we anticipated that. I mean, you can join the code, but the pass for us investigating you was only good until last February. So you had to join the code before last February. What we didn't want the code to be was this sort of

"Get Out of Jail Free" card. That when you thought maybe you were going to be investigated, you signed onto the code. So that's why we had a time limit for it -- you can still sign on to the code, but you don't necessarily get a free pass. You don't get a free pass. "Free pass" maybe isn't quite the right word.

**Q: And if you sign on with the code and then the monitor were to discover repeated violations, is there a process for kicking someone out?**

**PS:** Yes. If you don't comply -- if you don't remedy your violations by the time the monitor's next visit comes around, then you are kicked out of the code, so to speak, and therefore we are free to investigate you for past violations and to assess you for those monetary violations.

**Q: What do you think is the importance of the seal that signifies the greengrocer has agreed to the code?**

**PS:** Well, we created the seal because we wanted to have a consumer campaign. And I know that there was a sort of a campaign when the sign-in period was going on for getting the pass. Jobs with Justice had people going around, asking if you signed onto the code. And it was sort of that consumer aspect that you signed onto the code and you could put the seal in your window.

In a lot of places in Manhattan, there are two or three greengrocers per block. And so consumers have choices and our idea was that, if they had a choice, they would go to the greengrocer that had the seal as opposed to one that didn't.

**Q: Is that something that the greengrocers themselves were asking for or looking for?**

**PS:** That is something that the Korean-American Association asked for, yes, in the code. And we thought it was a good idea for that reason.

**Q: Was there any discussion of health or pension benefits as part of the code or was that too -- were any of the workers' groups advocating for that idea?**

**PS:** There were discussions of health and pension benefits. And the employers were resistant to that and, frankly, we were nervous about -- given the fact that, when you signed onto the code, you were actually signing an agreement with the government, a binding agreement with the government. We had some concerns about whether we, as the government, had the ability to require them as a condition of the benefit -- us not investigating them -- to basically create employee benefit plans. Because that's what it would be. We had some real ERISA preemption questions about whether we could require that. Just as the workers wanted us, at one point, to put in the card check or union neutrality agreement, and we had the same legal concerns about NLRA preemption, about whether the government could, as a requirement of benefits, require an employer to remain neutral, to give up a right under the NLRA.

So when we get into areas, because we are the government and it's not just a voluntary document, we were concerned for overstepping our legal boundaries.

**Q: One thing that I find fascinating about the code is that it does look a little bit like a collective bargaining agreement. Is that something that you would kind of dispute or something that you think you would agree with?**

**PS:** Well, it looks like a collective bargaining agreement in that it guarantees workers certain rights that they are not required by law. And frankly, that was one of the workers' concerns or the workers' groups concerns was that these are very small stores. And that, while there were organizing efforts at some of the stores, most of these stores were never going to be organized and that maybe the code was a way to get the workers some benefits that they would otherwise get through collective bargaining and they could maybe get without collective bargaining, but it was more broad in general.

**Q: It sounds like almost every store had conditions that were much less than the legal minimums, right?**

**PS:** Well, right, and so that's it. I mean, it's sort of an odd collective bargaining agreement, if you want to think about it that way, that basically requires the owner to comply with the legal minimum, because they obviously have their separate obligations to comply with the legal minimum.

**Q: But there's also the vacation and sick days.**

**PS:** Right. And that was something that the worker groups were very interested in getting into the code.

**Q: Something more than just abiding by the minimum, the law. Were there any concerns on either side that this might either help or hinder collective bargaining as far as the future?**

**PS:** I think that there were concerns on all side and they went both ways. I mean, I think one of the things that we had -- it was a very delicate situation, shall we put it that way? The situation between the employers and entering



into this and sort of convincing all of the parties that it was good for them. But employers were concerned about collective bargaining and I think that the workers were concerned – that this was not something that would make collective bargaining harder and that this was not something that would make collective bargaining easier.

So I think that the theme of collective bargaining and how it affected everything may not have been on the table at all times, but it was definitely in the background as the negotiation continued.

**Q: Are any of the greengrocer employees represented by unions?**

**PS:** There are a few greengrocer employees represented by unions. Local 169 had some. I don't know if any of those signed onto the code. Local 1500 UFCW took over their campaign. And I know there's at least one greengrocer who's got a 1500 contract who's in the code. There may be more. One of the things that the code does, is that if there is a monitor's report and there is a violation, the code says that if there's a collective bargaining agreement in place, then the union has to be notified. And so, when the monitor goes in, because of that provision of the code, they note in their monitoring report whether there's a collective bargaining agreement or not for that reason.

***“The labor violations in the stores were almost identical: the workers worked 12-hour days, 6 days a week and they got somewhere between \$200 to \$300 a week. They were paid by the week for 72 hours and 12-hour days, 6 days a week.”***

**Q: Do you know if there are any ongoing union campaigns at this point?**

**PS:** UFCW might have ongoing union campaigns; I'm not really sure.

**Q: Was the NLRB involved in any of this? Either on the periphery or in the actual negotiations?**

**PS:** No.

**Q: Were there any Unfair Labor Practice charges filed at any point, do you know?**

**PS:** There were a number of UFCW campaigns that were ongoing and I'm sure there were ULP charges filed. But I'm not really aware of the content or -- I'm not even aware of any specific ones.

**Q: That wasn't part of this agreement, any dismissal of such charges.**

**PS:** No, nothing. There are three separate unions that I can think of that have been involved in organizing greengrocers: 1500 of the UFCW, 169 of UNITE and some local out of New Jersey of the Longshoremen. And none of those unions were actually at the table.

**Q: Were they upset about that?**

**PS:** Well, I'm sure they would have liked to be at the table, but that was part of our compromise with the employers is that the unions themselves would not be at the table. There was, like I said, a representative from the state AFL-CIO sort of representing workers in general, but no union in particular there.

**Q: What do you think about the role of ethnic organizations representing employers and employees? Do you think that was helpful in this case?**

**PS:** I think it was very helpful in this case. This industry may be somewhat unique in that the owners are primarily an ethnic immigrant group and the workers are primarily another ethnic immigrant group. So in that type of situation, the trade association, for instance, that we dealt with is the Korean Produce Association. It's not the "Produce Association"; no, it's the "Korean Produce Association." So in the facts of this particular case, I think it was very helpful. That may be limited to this situation.

**Q: One question for the future is: how much might this apply in other industries? I've seen some press about laundry operators – is that something that this office is investigating?**

**PS:** We are doing a laundry operation campaign. It's relatively new and we don't have enough information right now to know whether it's ripe for a code. We haven't done enough cases to know if the violations are systematic, if they are the same. And another thing that I do know from the few cases we have is that it's not as if we have an ethnic owner group. And I don't know whether there is like a Laundromat Association -- whether there's a employer group that would be able to substitute for that other type of group. So, again, hard to know. Plus, frankly, we're really concentrating on getting the code that we have to work before we think about a code in another industry.

**Q: So this is something that you might use as a model, but you'd want to see how this works.**

**PS:** Right, and it would have to be tailored to each situation. So, for instance, we have a lot of restaurant cases, right? That would be totally different code, because the violations are different. They're not as uniform. Restaurants are not as uniformly run as greengrocers are. So you really would have to sit down and think it through.

**Q: It would seem to me you would need some sort of situation where you have a class of lower-paid employees, such that the threat of a lawsuit by the Attorney General's office would be meaningful to the employers.**

**PS:** Right. And you also have to have a situation where the threat of a lawsuit of the Attorney General's office is real. In other words, where we have a campaign and we're interested and workers are interested, such that employers don't feel like, "Well, I'll take my chances with the negative lottery. I won't come forward, I won't sign onto the code and they'll never find me."

**Q: Were actual workers very involved, either as a group or, in particular? Did you have one or two workers at each place at least of the places you were initially investigating that were cooperating?**

**PS:** Yes, yes. We are very careful that -- when we do an investigation, that we don't actually contact the employer until we have a substantial number of workers who have cooperated.

**Q: Is that something that's difficult to get, did you find?**

**PS:** It takes time. I mean, we've been very successful in eventually getting a substantial number of workers at every store to cooperate, but it does take time.

**Q: Do you have people on staff who are bilingual?**

**PS:** Yes.

**Q: And are the advocacy groups helpful in that or the unions helpful in --**

**PS:** Yes, yes.

**Q: What do you think will happen at the end of the two years? Will the code be extended?**

**PS:** I don't know yet. We're going to be sitting down in the near future with the new head of the Korean-American Association. The head of the Korean-American Association is a two-year term and then they can't succeed themselves. So we're dealing with --

**Q: Term limits.**

**PS:** Yes, term limits. The former head of the Korean-American Association was really a big advocate of the code. And we have yet to meet with the new head, so we have to see. I don't think that we would continue it without the active involvement of the Korean-American Association.

**Q: Would you be worried about people dropping out or --**

**PS:** Well, I mean, frankly, the effect of the code sort of -- it lessens over time, because if you get somebody into compliance and then they -- assuming that they've been there and they're in compliance and they sort of change their practices. Well, after six years, there won't be any threat of an Attorney General's investigation, because the statute of limitations will be over. So I mean, I think that the whole concept, as the people who have signed on, is that time goes on, the code becomes less important. So we'll just have to see.

**Q: So in terms of the possibility of this being a structure that the employers and the employees could kind of meet together and come up with a code that's maybe 25 cents or 50 cents above minimum wage in the future, the prospect of that happening is maybe not so great?**

**PS:** You know, I don't know how the culture of running greengrocers is going to change after a few years of running a greengrocer where you are actually paying people the minimum wage and giving them whatever. It may be that you find happier employees and the greengrocer will say, "Yeah, I'm going to start to give people raises, because I want to keep them." You know, I don't what the long-term effects of that will be.

**Q: Did any of the greengrocers have concerns that they would go out of business, given these higher wages they would have to pay?**

**PS:** That was a big concern with the vacation and the sick time. That was the main concern, that it was hard enough to pay the minimum wage, let alone anything else.

**Q: I imagine if you're getting away with paying substantially less than the minimum wage and then suddenly you have to pay that, I would imagine that that would change your business, to some extent. You have to raise prices or --**

**PS:** Yes, and that's why we're trying to get as many people to sign on. We kept saying to the Korean-American Association, for the competitive reasons, if you're the guy who's paying minimum wage, you want all your competitors to be paying minimum wage, too.

**Q: Sure, sure. So did any of the people who joined the code kind of say, "Hey, there's this deli/greengrocer down the block that's not a member and we think that they haven't been paying minimum wage?"**

**PS:** I haven't heard any squealing on one another to date.

**Q: How different do you think this is in terms of the landscape of labor and employment law? Do you think this is really something that has the potential to really change the way --**

**PS:** Again, I think it has changed the landscape of greengrocers. I mean, I think that it has been very successful in getting a lot of greengrocers into compliance and giving them a way to get in -- to have an incentive to get into compliance quickly. I think it's a very interesting experiment and we just have to see how it works here and how it can be modified to work in other areas where we have similar-type of problems.

And I think there are a lot of other industries that there's at least a potential for -- restaurants being one. Someone was talking to me about small hotels -- not the larger ones, but small hotels in New York City; they think there's a real issue about the violations. So laundries may be another, if we see that there's a whole pattern of violations. We just sort of have to look and see.

**Q: Most of the labor laws cut across all industries. Do you think, in terms of enforcement, an industry-specific approach is the better way to do it?**

**PS:** Well, from our perspective, because we have such few resources, we want to try to get the biggest bang for our buck. And it does seem to be useful because, if we announce, "Okay, guys, we're targeting your industry, okay? You will be seeing us, we will be coming around," I think that we saw, in the greengrocer industry even before the code, just with employer education and knowing that we had a lot of investigations in that area, that there were changes that were made. So that's one way to sort of help maximize the limited resources of this office in enforcement. And there are a lot of other -- there's the state Labor Department, there's the federal Labor Department that do across-the-industry. And it's not -- it's not as if we limit ourselves to a particular industry even when we have a campaign. Depending upon the case that comes into us, we may decide to use our resources and do that case.

**Q: Were any or a substantial number of the Mexican workers undocumented and did this cause any problems for your investigation?**

**PS:** We don't know what the documented status of the workers are. It's the law that the labor laws apply to everyone, whether they're documented or not. So it's not relevant; we don't ask irrelevant questions. We don't ask people if they're married, because it's not relevant. We don't ask people what their documented status is.

**Q: And I guess in New York State *Hoffman Plastics* doesn't apply.**

**PS:** Well, *Hoffman Plastics* wouldn't apply to these cases anyway, even it was federal, because all of these cases deal with workers who actually worked and they're trying to get paid for the work that they already did. As opposed to *Hoffman Plastics*, which was a retaliation case, so that you were getting back pay, which is pay for work that you didn't actually do. So even after *Hoffman Plastics*, the federal Labor Department takes the same position that we take, which is that it doesn't affect wage and hour claims.

**Q: You mentioned the educational seminars. What do those actually involve? Would they come to your office here and --**

**PS:** No, we generally have it in Flushing or we'd have it at the Korean-American Association. So we generally go there and we get a translator and it involves two lawyers from this office standing up and explaining the labor laws and then taking questions and answers about specific issues. And we've had four or five of them, probably more than that. We're going to more in the fall, because you are required to go to one if you're on the code. And half of the employers on the Code have already attended.

**Q: Do you think that's a significant problem out there, particularly in industries where immigrants are acting as employers? Or do you think it's something that was limited to the greengrocers?**

**PS:** Well, I don't think that it's so much absolute ignorance of the law -- it's almost like more of a cultural thing. That compliance with the law is not the top of their sort of list of things that they need to -- I think it's a more cultural -- I mean, I think that there were --

**Q: It's an insular group. They don't have a lot of contact with people who might ...**

**PS:** And they basically run the business the way their predecessor ran the business and their -- and so -- and I also think that it's -- I mean, we did a lot of reading in this office about Korean culture and the Korean community as we went into this. I think it's very important, if you're going to negotiate with an immigrant group, to try to understand the thinking of that immigrant group.

And I think that what you find with Koreans is that, when they started out -- they tend to be small merchants. And they started out, you know, within the extended family working. So you didn't pay your extended family, right? It was a family business. You know, it's only now as you work a little harder and get a little better that you hire employees. But you don't actually have experience with how you're supposed to legally treat employees, because you don't necessarily work that way when it's an extended family-run business.

**Q: It seems to me that oftentimes you have members of the family working -- you know, just from my own limited experience, I see Korean-Americans working behind the counter maybe at the cashier and then the Mexican workers are bringing up the produce.**

**PS:** Right. But twenty years ago, you probably would see only Koreans working in that store, right? The brother would work or the sister would work or the daughter would work or the grandmother would be behind the counter and the father would be doing the produce. So I think that you see an evolution of having employees.

**Q: Do you think, just based on your experience, that there's a significant problem in other industries of a lack of meeting the basics, the minimum wage and overtime, that sort of thing?**

**PS:** Yeah, I think there's a big problem in the restaurant industry. I especially think there's a problem with kitchen help in the restaurant industry. We often get waiters or waitresses who will come to us, but getting kitchen help to come is very difficult. And I suspect that there are violations there.

**Q: How does that work -- in terms of the kitchen help, they get paid the minimum wage? Do they get \$5.15?**

**PS:** Right.

**Q: And waiters and waitresses get, is it \$3 plus tips?**

**PS:** It's \$3.30 plus tips.

**Q: Now do they have a right to those tips? How does that work?**

**PS:** Yes, they do have a right to those tips. You can pool tips if the waiters and waitresses agree to it, but the people in the tip pool can only be service personnel. For instance, kitchen help cannot be in the tip pool, managers can't be in the tip pool. And depending upon the restaurant, even with the waiters and waitresses, you see different problems. The more high-end restaurants, you see a problem of managers in the tip pool, being forced to tip out the managers. At the lower-end restaurants, we sometimes see people who are forced to work for tips, no wages. I have investigations where they're working for a dollar an hour plus tips or twenty dollars a day plus tips, without regard to how many tips they make, and it's not 3.30. So, I think you see various problems.

But really the kitchen help, they tend to be more immigrant workers and they don't --

**Q: Is there a particular ethnicity ...**

**PS:** No, no. Not that I'm aware of.

**Q: Well, people maybe with lower skills who might not have the opportunities ...**

**PS:** Well, I think especially people who don't speak English. I mean, you can't be a waiter or a waitress and not speak English. But you can be kitchen help and not speak English or not speak very well.

**Q: And you think that sort of situation might be amenable to some sort of code?**

**PS:** We're a long way off to this. I suspect that there are problems in the kitchen, but I have very few cases where I can get the kitchen help to come forward.

**Q: Interesting. But the restaurant industry might be something similar to the greengrocers in that public approval or disapproval might be important.**

**PS:** Right, right, exactly. It's also a very competitive industry where people could choose to go somewhere else.

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