

# Office of General Counsel

## ANNUAL REPORT

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### 2023

**The Niagara Frontier Transportation Authority  
and  
Niagara Frontier Transit Metro System, Inc.**



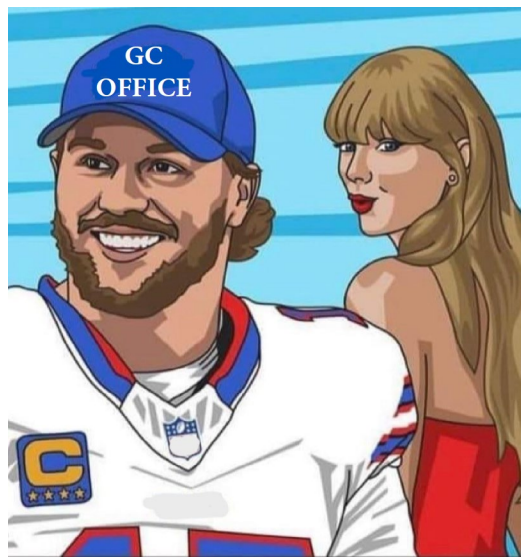
## Introduction

2023 was filled with significant and historic events. The Israel-Hamas conflict, the emergence of Artificial Intelligence (AI) into our daily lives, and the year of Taylor Swift. I am not sure if we have any “Swifties” on the floor, but I do know that we are so proud and fortunate to work in the transportation industry and to support the heroic transit and aviation workers that make a difference in people’s lives. As to AI, although we might someday use AI as a tool to help us do our jobs, I am proud to say our legal advice, analysis and recommendations will continue to be provided by humans for humans and for the benefit of our human clients and the public we serve. To err is human, but “[t]he only man/woman who never makes mistakes is the man/woman who never does anything.” President Theodore Roosevelt. And if we do err, “as a wise man once said: ‘An error does not become a mistake until you refuse to correct it.’” President John F. Kennedy. As detailed in this report, 2023 has been an outstanding and busy year.



The activities described in this report reflect the diligent work of the professionals in the Office of the General Counsel who serve the public by providing high quality legal services to support the NFTA’s mission of providing safe, efficient, and professional transportation services that enhance the quality of life throughout the Buffalo Niagara region. I want to thank Kimberley Minkel, the NFTA’s Executive Director, and the NFTA Board of Commissioners for their support and for allowing our office to serve the public. Special appreciation for extra work on this report goes to Jodie Zolnowski (Manager of Administrative Services and Assistant to General Counsel).

General Counsel  
David J. State (December 31, 2023)



## I. Overview of the Office

The Office of General Counsel provides and/or administers all legal services for the Niagara Frontier Transportation Authority (“NFTA”) and Niagara Frontier Transit Metro, Inc. (“NFTM”) on civil and administrative matters. The NFTA is a multi-modal entity (Aviation, Surface and Property) providing efficient and professional transportation services that enhance the quality of life in the Buffalo Niagara region. NFTM is a subsidiary of the NFTA and provides bus and rail transportation services within Erie and Niagara Counties.

These legal services include representation of the NFTA and NFTM in negligence claims, negotiations with state and federal agencies, arbitrations involving collective bargaining agreements or employee grievances, professional negligence, tort and contract claims, condemnation and relocation proceedings, negotiation of collective bargaining agreements, preparation of leases, releases, use and operating agreements, settlements and memoranda of understanding.

The Office of General Counsel provides advice, opinions and counsel to the Board of Commissioners, the Executive Director, business center managers and staff on matters concerning labor and employment relations, environmental compliance and litigation, landlord-tenant and real property transactions, procurement and contracting issues, suretyship, risk management and insurance, municipal bonds and finance, secured transactions, commercial relationships and corporate and legislative concerns.

Under the direction of the General Counsel, staff attorneys appear in state and federal trial and appellate courts and before arbitration panels and administrative agencies such as the New York State Department of Labor, the U.S. Environmental Protection Agency, the New York State Department of Transportation, the Federal Aviation Administration and the Federal Transit Administration. General Counsel attorneys draft proposed agency rules and administrative procedures and pursue enforcement and collection of judgments for fare evasions and parking violations. Staff personnel manage the board agenda, prepare resolutions for consideration by the Board of Commissioners and assist and provide guidance to user departments and business centers on procurement and various other matters impacting the day-to-day and long-range operations of NFTA and NFTM.

The Office also oversees the NFTA’s Procurement Department. This combination has strengthened the Procurement Department’s exceptional performance in procurement compliance and ethics and facilitates continued focus on those areas so that Procurement can continue to successfully perform their mission to “procure high-quality materials and services which provide safe and reliable transportation, transportation services and facilities for our customers.”

## II. People

The strength of any organization is reflected in its people. The Office of General Counsel has a full complement of high caliber professionals who serve the public with honor and integrity. Staff members are dedicated and hard-working professionals who provide selfless service to the public.

In 2023, we had significant personnel changes that strengthened our office. Debra Kashishian rounded a 48-year career as a litigation paralegal, which included 21 years at the NFTA as Senior Paralegal. Her contribution to the success of the litigation team during her career was invaluable. Debbie was honored at a retirement party on October 26, 2023. Following Debbie's retirement, Sheila Keane returned to the team, and we are thrilled to have Sheila re-join the Legal Department. Sheila will be supporting Vicky and the litigation team.

Allana Benton, Esq., successfully passed the New York State Bar Exam and was admitted to practice law in New York. Allana was named Associate Counsel and Records Access Officer. Allana is a success story in that she started her career at the NFTA as an intern and has now advanced to an Associate Counsel and Records Access Officer.

Finally, Robert Hannon joined the NFTA as our new Procurement Manager. Robert is a former United States Army Captain and holds an MBA from Clarkson University and a BS in Finance from SUNY Brockport.

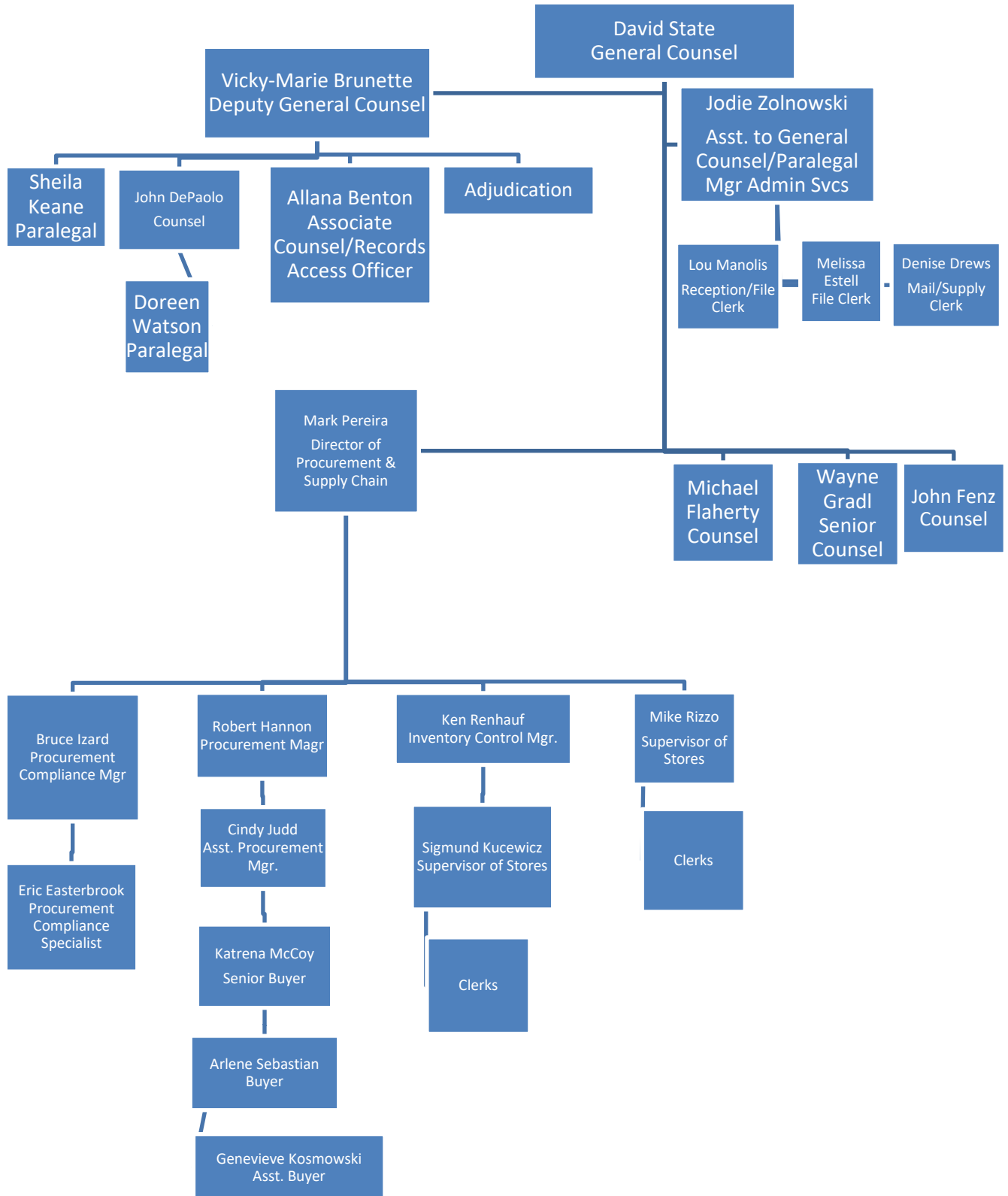
### A. Personnel and Location

The Office of General Counsel consists of a General Counsel, a Deputy General Counsel, a Senior Counsel, three Counsels, an Associate Counsel/Records Access Officer, two Paralegals, and one Manager of Administrative Services and Paralegal/Assistant to the General Counsel. The majority of the Legal Staff is located on the 6<sup>th</sup> Floor of the Metropolitan Transportation Center ("MTC") at 181 Ellicott Street in downtown Buffalo, New York. John Fenz is located at the Buffalo Niagara International Airport to efficiently serve the Aviation Group.

The Office of General Counsel also oversees the Procurement Department. The Procurement Department is led by Mark Pereira, the Director of Procurement & Supply Chain, a Procurement Manager, a Manager of Procurement Compliance, an Assistant Procurement Manager, Senior Buyer, Buyer, Assistant Buyer, Procurement Compliance Specialist, Inventory Control Manager, and other direct reports.

The Office of Administrative Services is led by Jodie Zolnowski as the Manager of Administrative Services and Paralegal/Assistant to the General Counsel.

A graphical description of all current staff members is depicted below:



## **B. Professional Training, Development and Outside Activities**

### **1. Professional Training and Development**

We pride ourselves on obtaining and maintaining professional certifications and skills to better serve our clients.

In 2023, Vicky-Marie Brunette earned 26 hours of CLE credits and professional development instruction in a variety of topics, including: 1) Annual Ethics Updates; 2) Deposition Obstruction; 3) Breaking the Age Barrier: Combatting Biases in a Multigenerational Workplace; 4) Internet Eyes and Spies; 5) New Marijuana Law: The Intended and Unintended Consequences; 6) Critical Changes in New York's Rules: Hyperlinking and Bookmarking Briefs; 7) Nazi Looted Art – Litigation and Dispute Resolution; 8) Women in Law: 2 Steps Forward, 1 Step Back; 9) New York's New Notary Rules; 10) Seeing Beyond the Scans: TBI Illustration Tech; 11) Deliberate Voir Dire; 12) The Hidden Language of Lawyers: Mastering Body Language and Voice in the Courtroom; 13) Precautions for Proper Protection: Client Communications, Data, and Cybersecurity; 14) Unified Differences: Appeals in NY's 4 Departments Under the Statewide Rules; and 15) Medical Malpractice Parts 1, 2 & 3.

In 2023, John DePaolo earned 24 credit hours of CLE instruction through the New York State Academy of Trial Lawyers and other legal education providers. Topics included: 1) Crowd Sourcing Surrogate Jurors; 2) Defending against Cyber Threats; 3) Update Pattern Jury Instruction; 4) Technology, Ethics & Remote Work; 5) Diversity – Combatting Bias; 6) Economic Damages; 7) Successful Settlement Techniques; and 8) Risk Transfer.

John also attended the 2023 Defense Research Institute's Civil Rights and Governmental Liability Seminar in Las Vegas, Nevada with training on Cell Phone Forensics for Legal Professionals; Qualified Immunity; Supreme Court Review and Analysis; Keeping your Police Clients out of the Dog House; Ethics Rules; and Closing Arguments-featuring Linda Dunikoski, Esq., lead Attorney in the Ahmaud Arbery Trial. John is expected to attend the 2024 Defense Research Institute's Litigation Skills Seminar in Miami, Florida.

In April 2023, Allana Benton learned she successfully passed the New York State Bar Exam and in June was admitted to practice law in New York. She was promoted to the position of Associate Counsel and Records Access Officer. She has attended seven CLEs on a variety of topics since her admission.



In 2023, Debra Kashishian rounded a 48-year career as a litigation paralegal, which included 21 years at the NFTA as Senior Paralegal. Her contribution to the success of the litigation team during her career was invaluable. Debbie was honored at a retirement party on October 26, 2023.



In 2023, Doreen Watson completed 10.5 hours of CLE and attended the following professional development webinars: 1) Google Eye View: CPLR 4532-b and Google Street Images; and 2) 2023 Annual Updates in Damages, No-Fault, Product Liability, Premises Liability, Ethics, Municipal Liability and Labor Law.

In October of 2023, we welcomed litigation paralegal, Sheila Keane, back to the

NFTA to fill the vacancy left when Debra Kashishian retired. We were thrilled to have Sheila re-join the Legal Department.

In 2023, John Fenz attended the American Association of Airport Executives Airport Law Workshop in Washington, D.C. This seminar is considered one of the premier educational offerings for airport law in the United States. The three-day seminar offered presentations on: regulation of airport finances; federal grant assurances; minimum standards and qualifications for aeronautical tenants; federal infrastructure funding; negotiation of airline use and lease agreements; airport concession disadvantaged business enterprise initiatives; non-aeronautical land use on airport property; emerging environmental issues; ethics; and diversity, equity and inclusivity obligations.

From October 25, 2023 through October 27, 2023, John Fenz also attended the American Association of Airport Executives Passenger Facilities Charges and Rates and Charges Workshop in San Antonio, Texas. John also obtained 24 continuing legal education credit hours in the following areas: Unconscious Implicit Bias in the Legal Profession; ADR Considerations for General Counsel and In-House Legal Departments; Proficiency, Professionalism and Bias; Attorneys' Duties When Using Technology; Ethics and Professionalism for the Practicing Lawyer; The American Silver-Tongued Litigator; An Obligation to Provide More Than Legal Advice; Lessons in Draftsmanship: How to Write Great Agreements; Nondischargeability: Will This Debt Survive Bankruptcy; Part 1: The Second Amendment, A History; The Second Amendment, States Rights; Winning Contract Disputes; Contract Preparation for the Transactional Attorney; Is that Worker an Employee?; The Business Lawyer's Guide to Insurance; Punitive Damages in Civil Rights Cases; First Amendment Speech; Employment Law; The Basics of Negotiating; Title XI; and Sex Crimes v. Sexual Harassment.

Michael Flaherty attended continuing legal education credit hours in the following areas: Cybersecurity, Privacy & Data Protection for Lawyers, 2023 APTA Legal Affairs Seminar, ChatGPT: Ethics and the 21st Century Lawyer, Cybersecurity and Data Privacy for Law Firms, Contract Considerations and Negotiating Preliminary Matters, Commercial Leasing and Understanding Indemnification Provisions in Construction Contracts.

Jodie completed continuing legal education credit hours in the following areas: Smarter Insights Webinar Series: The Internet changed everything, With AI, everything must change, AI for Litigators, Mediation in Federal Court: From the Western District to the Second Circuit, Mediation Ethics, Navigating the Present, Charting the Future: A Year-End Reflection and Outlook and The Modern General Counsel Legal Advisor and Strategic Business Partner.

In 2023, Wayne Gradl received 7 hours of CLE at the Annual NYSPELRA Training Conference in Saratoga. In addition to that, he opted to take advantage of the FREE lunch time Zoom CLEs offered by New York State Academy of Trial Lawyers and thus also received CLE credit this year for topics including: Municipal Law Update,



Premises Liability Update, No-fault Law Update, Products Liability Update, Med Mal Update, Labor Law Update, Damages Proof Update, CPLR Update, PJI Update, Evidence Update, NY Court of Appeals Update, Second Circuit Practice Update, Voir Dire Tips, Opening Statement Tips, Trial Presentation Tips, Settlement Negotiations Tips, Difficult Client Management Tips, AI in Legal Practice, Cybersecurity for Lawyers, Ethics Update and DEI for Lawyers.

In April 2023, the Procurement Department participated in an offsite meeting that focused on process flows and procurement protocol. Training was provided on determining fair and reasonable pricing along with drafting an independent cost estimate. Each participant provided a 5-minute presentation on their area of expertise.

## **2. Outside Activities**

Professionally, in 2023 Vicky-Marie Brunette was selected again to serve on the Bar Association of Erie County's Judiciary Committee. She was also appointed to serve as the Western's delegate to the Women's Bar Association of the State of New York's (WBASNY) LGBTQ+ Committee and Co-Chaired WBASNY's Corporate Committee. Vicky continued her service on a Jury Diversification Panel and Focus Group in the Eighth Judicial District. She served another term as Co-Chair of the Social Committee of the Defense Trial Lawyers Association of WNY and assisted with revising their By-Laws.

In her personal life, Vicky was selected to join the Board of Directors of the Ovarian Cancer Project (OCP) in July of 2023 and was elected to a three-year term as Vice President. The mission of the OCP is near and dear to Vicky as she lost her mother to ovarian cancer in 2015. Vicky completed a fourth term as the Delaware Women's Golf Club's Marketing and Publicity Chair in 2023, as well.

John DePaolo is active with the Rotary Club of the Buffalo and serves on the Grants Committee. Grants in 2023 have been awarded to Niagara Frontier Radio Reading Service; Westminster Economic Development Initiative; Harvest House; Assembly House and Child & Family Services.

John is also active with the Rotary District (7090) involving service clubs in the Niagara Frontier and Southern Ontario. John continues as the Education Chair of the WNY Defense Trial Lawyers Association which provided multiple legal seminars in 2023. John has continued to support the Matt Urban Hope Center which organization responds to the needs of the community by hosting family-focused events, informative workshops, free tax preparation, benefits screening, housing and job assistance and assists individuals who are homeless and those at risk for becoming homeless.

Allana Benton maintains a positive relationship with the legal community by attending University at Buffalo School of Law events and events hosted by local organizations such as the Minority Bar Association.

Doreen Watson worked as a volunteer representing NFTA Metro at the Buffalo Common Council’s Winter Preparedness event. She is a loyal bus rider and often travels with her bike during the summer months. In 2023, Doreen participated with Reddy Bikeshare, which partners with the NFTA to promote health and wellness and provides rental bikes in front of the downtown headquarters. Having not played her flute since high school, Doreen decided to pick up her instrument again. She joined the West Seneca Town Band, which has a 150-year history and holds concerts in the community throughout the year to help “keep community music alive.”



In her never-ending quest to join the elite ADK 46ers, last April, while on a yoga retreat in the Adirondacks, Sheila Keane climbed Bald Mountain (by her estimation, a moderately challenging out and back) in Old Forge, New York. Sheila said she felt like she had climbed K2 when she reached the summit with her daughter, Anna, and her yoga instructor!



Wayne continued his climbing activities and participated in one expedition to climb New Hampshire's Mt. Garfield in Winter conditions. He also opted to run in the Wellsville Ridgewalk 25k Trail Race to see if he could finish it and did complete it in an amazing 4 hours 3 minutes.

Outside the office, Michael is a Board member of the Buffalo Therapeutic Riding Center, President of the Community Council of the Newman Center at Buffalo State College, and Treasurer of the Notre Dame Club of Buffalo & WNY.

Dave State continued his service as a policy committee member of the Erie County Industrial Development Agency, and board member of the Buffalo Municipal Housing Authority. Dave also started playing pickleball.

### **III. Commitment to Diversity, Equity, and Inclusion**

The NFTA has a strong commitment to diversity, equity and inclusion as demonstrated by our adoption of the NFTA's Diversity and Inclusion Strategic Plan. To achieve the objectives of that Plan, the Office of General Counsel developed and implemented two programs to ensure that we are using our resources to enhance professional opportunities and development for underrepresented populations.

**Externship Program for UB Law Students.** In collaboration with members of the Minority Bar Association of Western New York and UB Law School's Externship and Judicial Clerkship Program, the Office of General Counsel established an externship program. Externships provide law students with unique legal and public service experience as they work in a variety of government and non-profit organizations and get academic credit for doing so. The NFTA receives the benefit of having a law student available to accomplish research and writing tasks and other duties. In order to qualify, the NFTA had to meet specific curricular, substantive and administrative requirements established by the Law School and the American Bar Association to ensure that the externship would be academically appropriate and in compliance with all other accreditation requirements. This program is open and available to all UB Law students; however, we place particular emphasis on attracting interested students from underrepresented populations.

**Diversity and Inclusion Mentoring Program (Paid Legal Internship).** Research indicates that to establish a successful workplace diversity program, creating more opportunities for continued engagement is critical. These engagement opportunities can come in many forms, one of which being mentorship programs. Mentoring is a vital component when trying to recruit diverse talent. Women and minorities were more likely to say that mentoring was an important aspect of their career, one study found. Given the findings that indicate that mentors play such an instrumental role in the career progression of diverse talent, it is imperative that organizations, like the NFTA understand how to effectively establish mentorship programs when trying to recruit diverse talent. It is also important for employees from underrepresented backgrounds to understand how to seek out mentors effectively and strategically. To meet these objectives, the NFTA established a paid legal internship program. A tremendous amount of credit and thanks is given to Vicky-Marie Brunette and Helen Tederous (the NFTA's Director of Public Affairs) for establishing this program. We are proud that the first participant in the program was Allana Benton, a 2021 graduate of UB Law School. Even more exciting is that Allana was named an Associate Counsel and Records Access Officer in 2023 and she was able to turn that internship into a full time career with us.

- **MWBE Efforts.** As later detailed in this report, our Procurement Department has had an outstanding year promoting DEI initiatives through their procurement work. The NFTA has achieved ongoing "A+" grades on MWBE Program Performance Report Cards from New York State. The New York State Aspirational Goal of 30% MWBE Participation was first reached by NFTA in FY 2019/20 as an even 30% was achieved. FY2022/2023 came in at 30.76%. In FY 2022/2023, NFTA's MWBE program has benefitted 56 Different MWBE Firms including marketing firms, architecture, engineering, building supplies, background checks, janitorial, paper, consulting, shipping, fuel, welding supplies and office supplies. The MWBE program generated \$6,760,000 dollars of spending for MWBE's this past fiscal year.



#### IV. Outreach and Preventive Law

The Office of General Counsel has a commitment to reducing the risk of legal problems by proactively providing legal advice before problems occur. The staff is strongly encouraged to be problem solvers and to identify appropriate courses of action to our clients, rather than identifying legal roadblocks without any solutions. In 2023 we expanded our ethics training initiative and began providing proactive procurement training to all of our employees.

## A. Ethics Training.



In April 2014, our office was initially certified by the NY Joint Commission on Public Ethics (JCOPE – the predecessor to the newly formed New York State Commission on Ethics and Lobbying in Government) to present the Comprehensive Ethics Training Course. In 2022, we had 5 law department personnel attend a train the trainer program so that they are now certified to provide this training. In 2023, we began to roll out this live training to all NFTA/NFTM employees via Operation METAL (i.e., Mandatory Ethics Training for All). Every Monday, these instructors are assigned to live training sites at various locations including 181 Ellicott, 247 Cayuga and the ARFF building at BNIA. As of December 2023, we have trained approximately 300 new and current employees and will continue this effort in 2024 as we strive to complete training for our entire workforce. The topics covered by this training include a description of the New York entities having jurisdiction over ethics; the NFTA’s Code of Conduct; the NFTA’s Code of Ethics; financial disclosure; negotiation of future employment; gifts; conflicts of interest; outside employment and activities; nepotism restrictions; honorarium; official activity expense payments; public service announcements; post-employment restrictions, and restrictions on political activities.

## B. Procurement Training.

- On December 7, 2023, the Procurement Department provided live procurement training at BNIA to a select group of Aviation workers. The training included topics such as procuring vehicles, delegation of authority, sole source, credit card policy, procedures/forms, MWBE/SDVOB program and requirements, DBE program and requirements, ethics (including prohibition on receiving gifts from vendors; rules on communications during the RFP restricted period; and Project Sunlight); and tips on writing better board actions.
- In October 2023, Bonfire Intake Module training was provided by the Procurement Department to NFTA employees who engage in the RFP/IFB process. Training topics included entering a RFP/IFB request and required supporting documentation.

## V. Administrative Services

In 2023, Central Services, managed by Jodie Zolnowski, begun scanning the paper files for each department who has expressed interest in this. So far, we’ve scanned files for Engineering, Claims, HSEQ, Rail and Legal. This project is in anticipation for the records management and digitization project that we’re currently working on. They also recycled 13,000 pounds of paper at Document Storage which is the equivalent of the weight of an African Bush Elephant.



## **VI. Contracts/Negotiations/Opinions/Regulatory Compliance**

The Office of General Counsel maintains an active transactional practice in the negotiation and drafting of contracts to procure goods, services and to acquire and dispose of real property for the NFTA. We are also frequently called upon to assist in negotiation of outstanding debts, contractual matters, policy revisions, preparation of opinions and to ensure compliance with laws, rules, and regulations. 2023 was a busy year for the transactional group. This work is primarily handled by John Fenz (who handles the aviation work) and Michael Flaherty (who handles the surface and property work). In addition, Allana Benton is starting to work on some transactional matters to strengthen our coverage in this important area. Here are some of the highlights:

### **Emergency Procurement During the December 2022 Blizzard**

- The intense and persistent snowfall of the December 2022 Blizzard created many difficulties for the NFTA, chief among them was the removal of snow to enable the reopening of BNIA to commercial air travel. John Fenz advised BNIA Management regarding the procurement of emergency contractors in accordance with NFTA Procurement Guidelines and prepared the required Emergency Declaration. Counsel also negotiated a reduction in the amount owed to snow removal contractor.

### **Negotiated Agreement with Turo, Inc. for peer-to-peer car sharing at BNIA and NFIA**

- In 2022 the Legislature of the State of New York enacted Article 40 of the General Business Law entitled “Peer-to-Peer Car Sharing Programs,” and states in pertinent part that if a public authority responsible for operating an airport requests a peer-to-peer car sharing program to enter into an agreement, then such peer-to-peer car sharing program shall enter into an agreement to: list vehicles parked on airport property or at airport facilities; contract for transportation to or from airport property or airport facilities; facilitate the use of a shared vehicle to transport airport passengers on or off airport property; or promote or market a shared vehicle to transport airport passengers on or off airport property. John Fenz negotiated an agreement with Turo, Inc. to commence peer-to-peer car sharing operations at Buffalo Niagara International Airport and Niagara Falls International Airport. The agreement generates revenue for the NFTA’s airport system and regulates peer-to-peer car sharing operations at the airports in a manner which does not impact NFTA operations.

### **Negotiated Agreement with CLEAR for registered traveler biometric identification services at BNIA**

- Through the Transportation Security Administration's (TSA) statutorily established Registered Traveler Program, CLEAR is the sole-source third-party provider authorized to provide biometric verification of traveler identification at airports. CLEAR verifies a passenger's identity with a touchless biometric scan and provides an expedited escort to physical screening conducted by TSA. John Fenz negotiated an agreement with CLEAR to lease space and commence its operations at BNIA. In addition to generating revenue for BNIA, CLEAR’s presence at BNIA will provide patrons with an additional option for expedited TSA screening.

### **Negotiated response to third party subpoena in the United States Department of Justice antitrust action opposing the merger of JetBlue and Spirit Airlines**

- In October 2022, JetBlue Airways Corporation announced that it reached a deal to acquire Spirit Airlines, Inc. for \$3.8 billion and in March 2023 the United States Department of Justice announced a civil antitrust lawsuit to block the acquisition. The NFTA subsequently received an expansive third-party subpoena from JetBlue seeking production of documents related to airline competition at BNIA. John Fenz engaged in negotiations with JetBlue’s attorneys to narrow the scope of the requests and ultimately provided a little over 3,000 pages of documents to satisfy the subpoena.

### **Negotiated agreement with Albright, Knox, Gundlach Art Museum for Gallery Space at BNIA**

- In the summer of 2023, the Albright, Knox, Gundlach Art Museum opened



to the public and further cemented its status as a cultural gem in the Buffalo Niagara region. John Fenz negotiated an agreement with AKG to occupy former post-security concession space and provide the following visual arts programming: a rotating display of video art from AKG's renowned collection; a rotating display of video material relating to AKG's expansion; art activities for children travelling from BNIA; and a library of various cultural and arts texts.

### **Article 78 litigation**

- Two separate Article 78 Proceedings were commenced against the NFTA by an unsuccessful vendor pertaining to our award of work for the continuation of returning traffic to Main Street in Buffalo, NY Michael Flaherty assisted outside counsel in responding to the Article 78s and both proceedings were dismissed in favor of the NFTA.

### **Vending Machines in Bus Garages**

- Vending machines in our bus garages provide a convenience to our work force that enables them to grab a snack or a soda at their work site as they complete their duties. Michal Flaherty worked on an MOU with the Amalgamated Transit Union to set forth the ground rules as to these vending arrangement with an outside vendor. In addition, he negotiated an agreement with an outside vendor to provide these services.

### **Challenges to Vendor Selection**

- Both John Fenz and Michael Flaherty assisted in responding to various administrative protests filed by vendors who were not awarded work by the NFTA's Board of Commissioners.

### **DL&W Stair tower/Easement with the City of Buffalo**

- Michael Flaherty negotiated an easement with the City of Buffalo to allow the NFTA to construct a stair tower along South Park Avenue. This stair tower is an integral part of the ongoing development at the DL&W terminal and will facilitate access to the 2nd floor of the terminal.

### **Records Access Officer/NFTA Website/Agreement on ITS4US Grant**

- Throughout the year, Allana has processed 195 FOIL requests - nearly double the requests received the prior year. In addition to her role as the Records Access Officer, Allana has begun to work on transactional assignments for the Authority. She has been assisting and attending meetings with Aviation, Government Relations, Procurement and Property to complete her assignments. Some of the assignments that she is currently

working on involve ensuring that the NFTA website includes all legally required information for a public authority and co-creating an agreement regarding the ITS4US grant. At the last Board Meeting of the year, Allana gave a presentation on the FOIL process to the NFTA Board of Commissioners.

## VII. Litigation

With approximately 1,500 employees and diverse operations from bus to light rail to aviation to property management, the Office of General Counsel handles a large volume and wide variety of litigated matters ranging from personal injury to commercial cases. Unlike many large corporations who routinely refer litigation to outside counsel, the NFTA's litigators are in court, arguing motions, picking juries, trying cases and getting verdicts. Vicky-Marie J. Brunette, John P. DePaolo, Doreen Watson and Sheila Keane continue to make an excellent team resulting in aggressive representation of the NFTA's interests in court. The success of this team was proven again in 2023 with skillful, favorable resolution of numerous cases that resulted in little or no monetary contribution from the Authority.

As of December 1, 2023, the Office of General Counsel retained a litigated caseload of 183 personal injury files, including automobile negligence, premises liability, wrongful death, civil rights litigation, and police professional liability files, with a total self-insured reserve of approximately \$3,476,360. The breakdown was 166 active litigated personal injury cases against NFTM, with a self-insured reserve retention of approximately \$3,296,760 and 17 active litigated personal injury cases against the NFTA, with a self-insured reserve retention of approximately \$179,600.

Of the 183 files, 177 are handled in-house by the Deputy General Counsel, Vicky-Marie J. Brunette, and Counsel, John P. DePaolo. Five (5) litigated cases are being handled by outside counsel, pursuant to indemnity agreements. One (1) litigated matter is being handled by outside counsel due to a conflict. The proper handling of a caseload this large requires significant work. The NFTA and NFTM are self-insured up to \$5,000,000 for each litigated matter; therefore, the potential exposure on any given case is enormous.

In 2023, Vicky continued to manage the Litigation Team, the Adjudication Department, and the Records Access Officer/Associate Counsel. She actively participated on NFTA's Management Team and the Authority's Senior Leadership Team, which involved developing and working on the initiatives contained in the Authority's Roadmap for the Future, as well as the Business Continuity Plan for both the Legal Department and Adjudication Department. She also continued in her role as a member of the Pride Committee and Diversity, Equity and Inclusion (DEI) Committee and assisted the EEO Department in updating the Authority's DEI Plan. Vicky was also pleased to mentor one of the Authority's rising stars as part of APTA's Emerging Leaders Program. On the litigation side of the house, Vicky appeared at approximately 43 pre-trial conferences; drafted and argued approximately 21 pre-trial/dispositive motions; handled one appeal; conducted

approximately 11 depositions; conducted 10 mediations and one binding arbitration in lieu of trial. She favorably negotiated resolution of approximately 14 cases short of trial, either by settlement or dismissal.

John has expanded his caseload throughout his sixth year with the Authority including motor vehicle negligence, premises liability, and police professional liability. In 2023, it is estimated that John DePaolo appeared at over 100 pre-trial conferences, conducted approximately 40 depositions, drafted and argued numerous motions to dismiss/compel, some of which resulted in cases or certain causes of action being dismissed, while others resulted in the Plaintiffs complying with long overdue discovery. John has continued to defend the NFTA and Metro by filing notices to admit, notices to preclude and numerous motions to strike notices for physical examination and notes of issue. Selection of experts necessary to support the defense positions include medical experts, engineers, and vocational experts. John has appeared for 11 mediations. John has favorably negotiated resolution of approximately 12 cases short of trial.

Whenever appropriate, the defense of the NFTA and Metro is tendered to adverse carriers consistent with contractual language. Presently, tenders of defense and indemnification are pending in litigation matters to the insurer for Independent Taxi Association, Inc., American Airlines, Inc. and Pike.

Of the 26 matters Vicky and John resolved, 6 involved no monetary contribution at all from NFTA or NFTA Metro.

Vicky is primarily assisted by Paralegal, Sheila Keane, who drafts pleadings and discovery, prepares trial notebooks, obtains medical records and other discovery documents required for litigation, and coordinates the retention of experts. Sheila also regularly interfaces with Court personnel and coordinates the resources, technology and staffing necessary to conduct virtual depositions and jury trials. Sheila re-joined the NFTA after a one-year hiatus and brings with her over five years of experience at the Authority and more than 20 years of experience in the private sector.

John works on his files closely with Paralegal, Doreen Watson. In her two years at the NFTA, Doreen has been proactive with identifying efficiencies within the Legal Department and streamlining processes. In November and the months leading up thereto, Doreen provided litigation support and trial preparation for the first jury verdict the department has seen since the pandemic shutdown. Team John/Doreen were happy to secure a no-cause!

In 2023, there were 22 new cases filed against the Authority. Vicky, John, Debra, Doreen and Sheila had an outstanding year as demonstrated by the following highlights in 2023.

**A. Wilson v. NFT Metro, et al.**

On July 6, 2020, the 67-year-old Plaintiff was a passenger on an inbound bus when the bus was cut off and had to stop suddenly to avoid impact. The Plaintiff was caused to come out of her seat briefly as a result. No injuries were claimed and all passengers including the Plaintiff continued to their desired stops. Two week later, a local law firm indicated that the Plaintiff was alleging negligence on the part of the bus operator and “serious injuries.” Plaintiff commenced treatment with a local chiropractor and a local surgical group alleging neck and back injuries. Eventually, the injury allegations expanded to include bilateral carpal tunnel. Medical records confirmed significant pre-existing conditions. A lawsuit was ultimately filed and Plaintiff sought damages in the amount of \$120,000. Efforts to arrive at a reasonable settlement failed. The defense asserted lack of a qualifying injury and that the operator’s actions were appropriate in an emergency and not negligent.

The matter proceeded to a bifurcated jury trial in New York Supreme Court. On November 9, 2023 the jury rendered a defense verdict and determined that the bus operator was not negligent. Numerous jurors thanked our bus operator for his service and shook his hand as they left the courtroom. John P. DePaolo handled the trial.

**B. Thomas v. NFTA, et al.**

This personal injury and excessive use of force claim arises from the arrest of Devere Thomas on February 2, 2017 at approximately 12:30 p.m. on Main Street, west of Utica Street, in the City of Buffalo. Transit Police Officer Nicholas Cacciatore initiated a routine traffic stop of the Plaintiff who had been parked illegally at a bus stop, within 15 feet of a fire hydrant, in a vehicle having heavily tinted windows. After pulling Mr. Thomas over, Officer Cacciatore smelled marijuana when he requested identification. He then radioed for back up. Officer Robert Gawlak arrived at the scene and attempted to speak to the Plaintiff, who would not lower his heavily tinted windows. After refusing multiple lawful commands, the Plaintiff revved the engine of the Ford Mustang he was driving, cut the wheel toward Officer Gawlak and fled the scene at a high rate of speed. Officer Gawlak stepped back as the vehicle brushed his pant leg and, fearing for his life, fired one shot from his service weapon into the lower right front windshield.

The vehicle continued south on Main Street and hit a dumpster at which time the Plaintiff and the other occupant, his brother, fled on foot. Mr. Thomas was apprehended in the yard of a nearby home. Once the Plaintiff was transported back to Transit Police headquarters, it was noted that his left hand was injured. He was then transported to Erie County Medical Center and treated for a gunshot wound to the left index figure.

Mr. Thomas was booked on a multitude of offenses. On July 5, 2017, the Erie County Grand Jury returned an indictment charging the Plaintiff with: 1) attempted assault of a police officer; 2) unlawful fleeing a police officer in a motor vehicle; 3)

obstructing governmental administration; 4) resisting arrest; and 5) unlawful possession of marijuana.

On July 17, 2017, Mr. Thomas was offered a plea bargain (over the objection of the officers) and entered a guilty plea for unlawful fleeing a police officer in a motor vehicle. On October 4, 2017 he was sentenced to a 9-month prison term. He served six of the nine months at the Alden Correctional Facility in Alden, New York. Mr. Thomas was released on March 28, 2018. On December 27, 2017, Plaintiff initiated legal action and filed Summons and Complaint. In his Amended Complaint Plaintiff alleges causes of action for false arrest/unlawful imprisonment, use of excessive force, assault and battery, claims pursuant to USC §§ 1981 and 1983, and a *Monell* claim.

Defendants successfully moved to bifurcate the discovery related to the *Monell* claim on March 31, 2023. Defendants subsequently moved for Summary Judgment on the balance of the causes of action. In a Memorandum Decision dated September 15, 2023, the Court granted Defendants' motion and determined Defendants established, as a matter of law, their entitlement to dismissal of Plaintiff's Complaint in its entirety. Plaintiff filed a Notice of Appeal to the Fourth Department, Appellate Division on October 26, 2023. Vicky-Marie J. Brunette is handling the matter.

### **C. Barfield v. NFTA, City of Buffalo, et al.**

On October 29, 2020 at approximately 12:20 p.m., a three-car train consist approached the inbound LaSalle Rail Station platform when 35-year-old, Brian Barfield, suddenly and without warning jumped from the platform into the trackbed, directly in front of Rail Car #103. The Rail Operator, Quandra Parrett (f/k/a "Quandra Parrett Ford"), went into emergency braking but was unable to avoid contact with the Decedent, who came to rest under the lead car of the train.

After performing a complete investigation of this matter, which included retrieving, reviewing, downloading and preserving relevant video from the LaSalle Rail Station and Rail Car #103, Transit Authority Police determined it was a suicide and closed their file. All fatalities are reportable to the Public Transportation Safety Board (PTSB), which is an independent agency located in Albany, New York that has statutory jurisdiction over public transit agencies statewide. The PTSB performed its own comprehensive investigation, which included a complete review of the LaSalle Rail Station video, the video from Rail Car #103, rail reports, rail car maintenance records, police reports, interview of the Rail Operator, etc. The PTSB determined that "the probable cause of this incident was the Unsafe Actions of the individual who intentionally jumped in front of the train as it was entering the LaSalle Station."

Plaintiffs' Complaint identifies the nature of the case as "wrongful death" and pleads four causes of action under a negligence theory, alleging: 1) the train operator's failure to exercise reasonable care to slow or stop the train; 2) the corporate defendants' negligence in allowing dangerous conditions to exist, including improper and negligent security measures, pedestrian barriers and construction of premises; 3) lack of police presence, lack of security, lack of ticketing personnel, lack of warning

signals, lack of handicapped accommodations (claiming decedent was “medically and legally disabled”); and 4) failure to install “platform edge protection.”

Defendants interposed an Answer, denied the allegations set forth in the Complaint and raised various affirmative defenses, including: 1) assumption of the risk; 2) culpable conduct of the Decedent; 3) the Rail Operator, Quandra Parrett, being confronted with an emergency situation; and 4) governmental immunity with respect to allocation of police resources.

Based upon the Record in this case and the irrefutable evidence presented, Defendants moved for Summary Judgment on April 21, 2023 and submitted that there was no genuine, triable issue of fact to present to a jury in this case and, as a result, the Complaint should be dismissed, with prejudice, in its entirety.

On July 7, 2023, in a thorough and well-reasoned Report, Recommendation and Order (R&R), the Magistrate Judge recommended that Summary Judgment be granted and that the Complaint and Counterclaim be dismissed. Plaintiffs objected to/opposed the entire R&R. The matter is currently before the Federal District Court Judge for review. Vicky-Marie J. Brunette is handling the matter.

#### **D. Moore v. NFTA, et al.**

On October 27, 2021, the *pro se* Plaintiff filed a Federal Court Complaint asserting claims under the Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. Section §1983, and New York State law. The claims were brought against the NFTA and three officials and employees. The Plaintiff was a Paratransit Access Line (PAL) customer who used the PAL services more than 200 times between June 2017 and April 2022. The Complaint alleges inadequate and discriminatory service on four (4) occasions during that period. Factually, the Complaint seeks to raise equal protection, access to courts and service issues.

On May 5, 2022, the NFTA Defendants moved to dismiss the Complaint and for Summary Judgment on the basis that the allegations were deficient and, further, that there was no discrimination or violation of Plaintiff’s civil rights. In a Decision and Order dated December 18, 2023, the Federal District Court Judge ordered that the motion for Summary Judgment will be granted unless the Plaintiff files an Amended Complaint correcting the deficiencies within thirty (30) days. John DePaolo and Wayne Gradl are handling the matter.

## VIII. Labor and Employment



Providing legal support to NFTA managers who work with the NFTA's 13 unions is no easy task and presents a significant challenge. Wayne Gradl, the NFTA's "labor lawyer", handles grievances, arbitrations and assists in contract negotiations with these unions. In addition, Wayne provides the NFTA/NFTM with advice regarding employee dismissals and discipline and discrimination and other Equal Employment Opportunity matters, including claims by passengers as well as representation in Federal and New York State courts and before administrative agencies such as the EEOC and New York State Division of Human Rights.

Some of the significant cases and matters Wayne handled in 2023 are listed below. The success in all these actions reflects the Authority's commitment to non-discriminatory and fair terms and conditions of employment to all employees. 2024 will be a challenging year in that Wayne is expected to begin his retirement. His professionalism and dedication to the NFTA will be missed. He has been the Greatest of All Time (GOAT) labor lawyer for the NFTA for many years, and he will not be easy to replace. We wish him well in the next chapter of his life.

### **Scope of an Electrician's job**

- A favorable Award was obtained in an arbitration with ILA 1949 which sought out-of-class pay for an electrician that was tasked to perform electrical work in the NFTA Police facility at the BNIA as opposed to electrical work on the airfield or the terminal building. The Arbitrator ruled that the scope of a BNIA electrician's job was anything connected with the Airport.

### **Court imposed stay over job posting grievance**

- A stay of arbitration was obtained against a grievance by ILA 1949 which sought force the Authority to post a specific type of electrician job. The prerogative of Authority management to create and post whatever jobs are deemed required at a given time was upheld.

### **Court imposed stay over time off grievance**

- A stay of arbitration was obtained against a grievance by the ATU which sought to force NFTA Metro to give additional time off to ATU employees who did not work during the storm around Christmas of 2022 and extra pay

not provided for in the CBA to those who did.

**NYSDHR – No probable cause determination (rail passenger)**

- A no-probable-cause determination was received from the State Division of Human Rights against alleged race discrimination in the Authority’s refusal to settle a property damage claim made by a rail passenger.

**NYSDHR – No probable cause determination (drug testing)**

- A no-probable-cause determination was received from the State Division of Human Rights against a claim alleging discrimination and retaliation in connection with selection for random drug testing and then sexual molestation during a supervised drug test.

**Arbitration Award (Personal Use of Vehicle)**

- A favorable Award was obtained which completely sustained the discharge of an employee who while operating a Metro vehicle on Metro time opted to engage in the personal errand of dropping off a self-nomination for Union office. The Arbitrator ruled that Metro need not tolerate the petty dishonesty of the misuse of a Company vehicle on Company time coupled with the employee lying in connection with that misuse.

**IX. Procurement:**

Despite the continuation of ongoing supply chain issues in 2023, the NFTA Procurement successfully procured all the normal and necessary goods and services to support NFTA/NFTM operations. The Procurement team is led by Mark Pereira and consists of Robert Hannon, Cindy Judd, Bruce Izard, Arlene Sebastian, Katrena McCoy, Kenneth Reukauf, Michael Rizzo, Sigmund Kucewicz, Genevieve Kosmowski, and Eric Easterbrook. The NFTA Procurement Team group had an outstanding year in 2023 as detailed below:

- MWBE Performance: The NFTA has achieved ongoing “A+” grades on MWBE Program Performance Report Cards from New York State.
- The New York State Aspirational Goal of 30% MWBE Participation was first reached by NFTA in FY 2019/20 as an even 30% was achieved. FY2022/2023 came in at 30.76%.
- In FY 2022/2023, NFTA’s MWBE program has benefitted 56 Different MWBE Firms including marketing firms, architecture, engineering, building supplies, background checks, janitorial, paper, consulting, shipping, fuel, welding supplies and office supplies. The MWBE program generated \$6,760,000 dollars of spending for MWBE’s this past fiscal year.



- NFTA Procurement expanded the use of its Bonfire procurement portal by implementing an Intake and Contract Module. As a result, Procurement has greater visibility of upcoming procurements and managing contract renewals/expiration.
- Through continuous improvement initiatives and by leveraging automation, the NFTA Procurement Team has seen an additional 15% to 20% reduction in procurement cycle time and administrative costs.
- The Procurement Team continues to promote authority wide training by hosting department level procurement trainings, updating procurement policies/procedures on Procurement University, and communicating best practices.

On July 13, 2023, Eric Easterbrook, Wafa Dubashi, and Arlene Sebastian from our Procurement Department represented the NFTA at the 2023 MWBE Regional Opportunities Expo Series of Buffalo. The event was held at the University at Buffalo, Buffalo Educational Opportunity Center (555 Ellicott Street) on Thursday, July 13 from 8 a.m. - 4 p.m. Keynote speakers included Jason M. Clark, Executive Vice President of Division of Minority and Women's Business Development, as well as Lieutenant Governor Antonio Delgado. The event brought in 47 agencies and authorities and hundreds of newly minted or prospective minority and/or women-owned businesses wanting information on buying from the NYS government.

In November 2023, Bruce Izard, Eric Easterbrook, and Sean Fitzpatrick represented the NFTA at the VETCON Forum in Albany, NY. Over the two-day event, Bruce, Eric, and Sean spoke to over 300 vendors about NFTA procurement opportunities and certification requirements. Also, the event allowed for vendors to meet individually with the NFTA representatives. Other NYS agencies participated in the event.

## **X. Goals for 2024 and beyond:**

Our goals for 2024 included, supporting initiatives of the Executive Director and the Board; continuing to support diversity in our employment practices and other activities; implementing ethics training for the entire NFTA workforce; an enhanced FOIL process using the GRANICUS platform; and continuation of a strong litigation posture to defend any claims asserted against the NFTA

END OF REPORT

