



ERIE COUNTY WATER AUTHORITY
INTEROFFICE MEMORANDUM

February 1, 2019

To: Jerome D. Schad, Chair
Mark S. Carney, Vice Chair
E. Thomas Jones, Treasurer

Cc: Terrence D. McCracken, Secretary
John Mye III, Executive Director
Jacqueline Mattina, Associate Attorney

From: Margaret A. Murphy, Attorney

Subject: Policy No. 92: Employment Opportunity Posting & Hiring

This staff memorandum will be placed on the Governance Committee's agenda for February 21, 2018. I would request that you review and provide me your *individual* comments, suggestions and questions before the February 13, 2019 filing deadline. Based on your individual comments, suggestions and questions, I will be able to revise, if necessary, the proposed policy for the Governance Committee to review and consider. A copy of this memorandum will also be given the Authority's new Executive Director John Mye for his review and comments.

After Commissioner Jones filed his resolution, he discussed with me the hiring flow chart, accompanying the current policy. The flow chart gave more details than the actual policy but neither the flow chart nor the policy reflects the procedure established by the Board in its hiring resolutions, which Commissioner Jones has proposed to rescind and change.

This proposed draft policy was my attempt to put Commissioner Jones' suggestion into a written policy while working out some of the details necessary to give the Board oversight in the hiring policy consistent with his suggestions. As Commissioner Jones stated at the last Governance Committee, he requested a change to one level of the flow chart, which has resulted in an eleven-page policy. In my view, the Board should adopt written policies and those policies may be later conveyed by flow charts. If the Board were to adopt the proposed revised policy,

staff would then prepare a new hiring flow chart.

SCOPE OF THE HIRING POLICY

Commissioner Jones is correct when he stated that this proposed, revised policy does not deal with “promotions, demotions and terminations.” As stated in the caption of the policy, it is intended only to deal with “Employment Opportunities Posting and Hiring.”

The Authority does have a few competitive, civil service positions that the County Personnel Department and the Authority post as both open and promotional. Under the Civil Service Law, the Authority may promote an employee who is on a promotional competitive list, by-passing those who may have ranked higher on the open competitive list. I see no reason why the Authority would need to expand upon this state policy allowing for promotional appointments. More importantly, the County Personnel Department is responsible for overseeing the Authority’s compliance of these civil services rules.

Finally, the proposed revised policy, as well as the current policy, is not intended to deal with employment discipline or termination. Discipline and termination are thorny areas, subject to provisions of collective bargaining agreements, as well as state and local civil service laws and regulations. Therefore, I would recommend Policy No. 92 deal only with the subject of hiring.

BOARD NOTIFICATION

Commissioner Carney stated he needed more time to review and consider the hiring notification procedures relating to the Board.

Here is a brief outline to assist the Board in its review.

- All positions fall within one of four categories: exempt, competitive, non-competitive, and pending jurisdiction classification (“PJC”).
- Under the proposed revised policy, the Board directly hires and appoints all exempt personnel and those individual holding PJC positions for which the Authority has requested be classified as exempt. Such appointments are made by resolution after the Board has reviewed and considered the recommendation of the Unit Head.
- For competitive positions, the Unit Head will select qualified individuals from civil service lists. The Secretary will send an appointment letter to the selected individual, copying the Board on the letter.

- Subject to certain restrictions, the Unit Head will directly hire and appoint all remaining positions, including making provisional appointments to competitive positions.
 - Before an appointment letter is sent, the Unit Head must timely send an appointment notice to the Board.
 - An appointment notice allows any Commissioner to file a resolution to hold the appointment in abeyance pending further discussion in executive session with the Board.
 - Once a Commissioner files a resolution to hold the appointment in abeyance, the Unit Head may not appoint until the resolution has been heard and resolved.
 - If the resolution fails, the Unit Head may proceed to make the appointment.
 - If the resolution carries, the Unit Head may not appointment without the Board’s approval.
 - Section 8 of the policy sets forth how the Unit Head provides the Board with an appointment notice and when the Secretary is authorized to send appointment letters.

UNIT HEADS

At the time I drafted the proposed revised policy, the Secretary had not finalized the draft Organizational Chart. It was my understanding when I drafted the revised policy, four executive staff members would report directly to the Board. These four executive staff members would oversee the following four units of the Authority’s operation: Governance, Legal, Operation and Finance. Nonetheless, once the Board has finalized the Organizational Chart, we can revise the provisions relating to “Units” and “Unit Heads.”

OPEN MEETINGS LAWS

Commissioner Jones raised another issue at the last Governance Committee meeting as to whether the Board receiving appointment notices by email and then not taking action upon such emails would be considered a violation of the Open Meetings Law. In his words, would “inaction be considered action” under the Open Meetings Law? The answer is no.

There is not a single case in New York finding a notice or communication sent to a Board by email violates the Open Meetings Law. I have also spoken yesterday with Robert J. Freeman, Director of the Committee on Open Government (“COOG”), who agrees with my opinion that the situation proposed by the revised policy would not be a violation of the Open Meetings Law. COOG views emails like other forms on inter-office memorandum. Members individually review such memorandum for informational or deliberative purposes. If a memorandum motivates a Board member to take some form of action, like filing a resolution, then the action, not the memorandum, triggers the Open Meetings Law.

Under this proposed, revised policy, a Unit Head would have the power of appointment for all positions, except exempt positions. A Unit Head is not a “public body,”¹ as defined by Public Officers Law § 102(2). A Unit Head notifying the Board of his/her intent to appoint an individual to a position would not trigger the provisions of the Open Meetings Law.

On the other hand, the Board is a public body. Therefore, when the Board appoints an individual to an exempt position, such action must be done in accordance with the Open Meetings Law.

FOIL REQUEST FROM COUNTY LEGISLATOR JOSEPH C. LORIGO

At the last Board meeting, you were given a FOIL request from County Legislator Joseph C. Lorigo. Legislator Lorigo has requested “all resumes submitted for all jobs posted by the Erie County Water Authority from July 1, 2018 through the date of [his] letter” of January 10, 2019.

I took the opportunity to confirm with Robert Freeman that the Open Meetings Law allows the Authority to withhold such information pursuant to Public Officers Law §§ 87(2)(b) and 89(2)(b)(i). Section 87(2)(b) would allow the Authority to withhold information “if disclosed would constitute an unwarranted invasion of personal privacy” under § 89(2) of the Open Meetings Law. Section 89(2)(b)(i) states that an unwarranted invasion of personal privacy would include the “disclosure of employment, medical or credit histories or personal references of applications for employment.” Mr. Freeman agrees that the disclosure of resumes of individuals who have sought jobs with the Authority would violate their personal privacy and should be withheld from disclosure pursuant to FOIL. Mr. Freeman and I

¹“Public body” means any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body. Pub. Off. Law §102(2).

discussed individuals who may have submitted a resume or employment application may not want their current employers to know they are seeking other employment opportunities. To disclosure such information would be in our view an invasion of their personal privacy.

I will draft a response to Legislator Lorigo's FOIL request, consistent with Mr. Freeman and my view on the matter. The Authority has until February 14, 2019 to submit its final response to Legislator Lorigo. In the Authority's response, I will indicate that we have spoken with COOG. Legislator Lorigo or his staff may confirm with Mr. Freeman his opinion on this topic.