

August 2010

A REVIEW OF THE ERIE COUNTY BOARD OF ETHICS

For the period January 1, 2007 through December 31, 2009



MARK C. POLONCARZ
ERIE COUNTY COMPTROLLER

Michael R. Szukala, MBA, CIA

Deputy Comptroller - Audit & Control
August 5, 2010

To the Honorable Erie County Legislature:

The Erie County Comptroller’s Office has performed a review of the Erie County Board of Ethics (“Board”) for the period January 1, 2007 through December 31, 2009.¹ Our objectives were: (1) to examine the Board’s process for and the review of financial statements (“Ethics Disclosure Forms”) required to be filed by candidates for County public office and County officials/employees subject to the Erie County Code of Ethics (“Code”); (2) to examine the appointment process to and membership of the Board; and (3) to examine the Board’s enforcement of the Erie County Code of Ethics which includes issuing advisory opinions, reviewing for conflicts of interest and ensuring that all employees that are required to file are filing annual Ethics Disclosure Forms.

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¹ Erie County Local Law No. 10-1989, as amended, repealed Erie County Local Law No. 7-1973, as amended, which previously established an Erie County board of ethics and an Erie County code of ethics. All references herein to sections and provisions of the Erie County Code of Ethics and Board of Ethics are in reference to Local Law No. 10-1989, as amended.

Summary of Findings

- **The Board is presently comprised of one (1) member.**
- **The Board has no written by-laws, policies, procedures, manuals or formal guidelines.**
- **Board members believe the Board does not have the authority to investigate the data disclosed in Ethics Disclosure Forms.**
- **Not all Ethics Disclosure Forms were returned for 2007, 2008 or 2009 by required individuals.**
- **The Board has incomplete minutes for the years 2007 and 2009 and no minutes for 2008.**
- **County employees are not disclosing to the Clerk of the Legislature their interests in County contracts, as required under the Code.**
- **The Board did not exercise its authority to fine those who did not comply with the Code of Ethics or General Municipal Law for the period of our review.**
- **The Board reviewed only a small sample of all the Ethics Disclosure Forms for 2007, 2008 or 2009.**
- **For those forms the Board reviewed, there are no formal criteria on what was examined.**
- **The Board has discovered no apparent ethics violations for 2007, 2008 or 2009.**
- **There is no mechanism for persons to report conflicts of interest to the Board of Ethics.**
- **Ethics Disclosure Forms are not being returned timely.**
- **Copies of the Code of Ethics are not being provided by the County Executive's administration to newly-hired County employees, as per the Code.**
- **There are inconsistencies between County departments determining which positions have are required to file annual Ethics Disclosure Forms.**
- **Some candidates for County elective office are not filing Disclosure Forms.**
- **The instructions for the Ethics Disclosure Form are not being followed.**
- **The Board did not issue any "Advisory Opinions" for the period of our review, nor do we have any evidence that any were requested.**
- **For those employees who are required to complete and file an Ethics Disclosure Form, there is no evidence that they are being notified they must complete the Form within ten (10) days of being hired.**
- **The Board has properly abided by the law requiring that no more than three members of the Board be from the same political party.**

Introduction

On February 2, 2010, the Erie County Comptroller's Office sent letters to David Mineo, immediate past Chairman of the Erie County Board of Ethics², and John Greenan, Commissioner of the Erie County Department of Personnel, informing them that Audit³ would begin a review of the Board and the Code. This was not the first review of the Board performed by this office. In 1980 Audit performed a review of the Board under the leadership of former Comptroller Alfreda Slominski. A copy of the 1980 review is attached hereto as Appendix One.

On February 9, 2010, former Chairman Mineo responded and indicated he was awaiting an opinion from the Erie County Attorney's Office before he would cooperate with our review. On February 22, 2010, First Assistant County Attorney Kristin Klein Wheaton of the Erie County Department of Law ("Law") sent an e-mail to the Comptroller's Office directing us to refrain from contacting Mr. Mineo further, and stated that she was preparing a legal opinion on whether the Comptroller's Office had authority to conduct a review of the Board. The opinion was issued by Ms. Klein Wheaton on April 1, 2010 and she asserted that the Comptroller's Office did not have the legal authority under the Erie County Charter ("Charter") to perform a review of the Board. The County Comptroller did not agree with Law and issued a series of subpoenas to obtain the information needed to perform the review.

Law and former Chairman Mineo contested the subpoenas. Additionally, Commissioner Greenan offered to provide a subset of the requested documents to the Comptroller's Office. The Comptroller rejected Commissioner Greenan's offer and filed an action to compel the parties to respond to the subpoenas and to confirm the status of the Board as an administrative unit of County government. A hearing was held on May 27, 2010 before New York State Supreme Court Justice Donna M. Siwek who ruled in favor of the Comptroller's Office by holding the Board to be an administrative unit of County government and ordering both former Chairman Mineo and Commissioner Greenan to provide the documents necessary for the Comptroller's Office to perform this review.

Disclosure

Under the Code, the Comptroller, Deputy Comptroller-Audit and five (5) other employees in the Comptroller's Office were required to file annual Ethics Disclosure Forms during the period of this review. The Ethics Disclosure Forms examined for this review included those filed by employees of the Comptroller's Office and the Comptroller himself. The Deputy Comptroller – Audit planned the work for this review, and oversaw its progress. Neither he, nor the Comptroller, selected or influenced the selection of any of the samples used in the performance of this review. As part of the review of Ethics Disclosure Forms performed by Audit, all of the forms filed for 2009 were examined and a sample of forms filed for 2007 and 2008 were examined.

² Mr. Mineo's term on the Board of Ethics expired on December 31, 2009.

³ When the words we, us, our and Audit appear in this report, they refer to the Erie County Comptroller's Division of Audit and Control.

The career civil service auditors who selected the samples and examined the data were not required under the Code to file an Ethics Disclosure Form.

The Board of Ethics

The Composition of the Board

Section 10 (b) of the Code provides that the Board “shall consist of six members who shall serve five-year terms of office, one such term expiring each year.” Members are appointed by the County Executive, subject to confirmation by the County Legislature. For the period of our review, the Board was composed of the following individuals:

2007	2008	2009	2010
David Mineo (Chairman)	David Mineo (Chairman)	David Mineo (Chairman)	
Anne S. Simet	Anne S. Simet	Maria LoTempio-Dines (confirmed 04/23/2009)	Maria LoTempio-Dines (resigned in 2010)
Joseph P. DiVencenzo			
Steven Schwartz (confirmed 10/25/2007)	Steven Schwartz	Steven Schwartz	Steven Schwartz
Michael Eberle Chief of Classification and Compensation PT			
Carmen Snell			
	Sue Agos-Quinn (name submitted for appointment in June 2008 but not confirmed though attended meetings and acted as if a Board member) Chief of Classification and Compensation	Sue Agos-Quinn (name submitted for appointment in June 2008 but not confirmed though attended meetings and acted as if a Board member) Chief of Classification and Compensation	Sue Agos-Quinn (name submitted for appointment in June 2008 but not confirmed though attended meetings and acted as if a Board member) Chief of Classification and Compensation

It appears that Ms. Snell attended meetings in 2007, and made motions at meetings, even though her term had expired on December 31, 2005.

Some Board minutes identify Sue Agos-Quinn as an ex-officio member for some meetings, but not others. Ms. Agos-Quinn succeeded Michael Eberle as the Chief of Classification and Compensation in the Department of Personnel upon his retirement on December 31, 2005. Ms. Agos-Quinn’s name was submitted for appointment in June 2008 as an alleged ex-officio

member. However, Ms. Agos-Quinn's appointment was never voted upon. Her appointment was "received and filed" – or terminated without a vote - by the Legislature on September 18, 2008. As her appointment was not approved by the Legislature, she was never a member of the Board. Ms. Agos-Quinn retired from the County's service on May 8, 2010 and submitted a resignation letter to the Board at approximately the same time. Though never confirmed, from the time of her attempted appointment to her resignation from the County, Ms. Agos-Quinn attended Board meetings and acted upon matters as if she was a fully confirmed member of the Board.

First Assistant County Attorney Kristin Klein Wheaton stated that she is an ex-officio member of the Board and its legal advisor. We have no record that she was formally appointed by the County Executive nor confirmed by the Legislature.

The Board's enabling legislation does not provide for ex-officio members, though it does require that "[o]ne member shall be a county officer or employee, who shall be a non-voting member of the Board." See Code § 10(b). With no reason to believe to the contrary, Ms. Agos-Quinn's attempted appointment was subject to that provision.

Kim Bowers' name was submitted to the Legislature in May 2009 for appointment to the Board. Her appointment was "received and filed" in May, 2009 by the Legislature and therefore she was never confirmed as a member of the Board. She was never notified that her appointment had not been confirmed until contacted by Audit in August 2010.

This leaves the Board with one member as of August 1, 2010 – Mr. Schwartz.

Appendix Two is a listing of the legislative appointments to the Board.

[A Summary of the Duties and Powers of the Board](#)

The Board is an independent administrative unit of Erie County. The Board's powers and duties are derived from the Code and New York General Municipal Law Article 18. Section 10 (d) of the Code provides that "the board shall be the repository for completed annual statements of financial disclosure required by this local law." In effect, the Board collects Ethics Disclosure Forms. As such, Erie County employees who are (a) elected officials, (b) all employees in a policy-making position in Erie County government and/or employees who through their regular duties are able to make County policy are required to annually complete an Erie County Ethics Disclosure Form.

As shall be explained in greater detail, the persons who must file include all County elected officials, all County department heads, division heads and their deputies and assistants thereto, all heads of administrative boards (including the Sewer Districts' Boards' of Managers and the Erie Community College Board), the chairman of the county committees of political parties and candidates for elective County office. A blank copy of this form is attached hereto as Appendix Three. The form, which asks for information based upon the New York State Ethics Code, is due on May 15 of every year for the previous year for those covered by the Code of Ethics. It

should be updated by an employee if a significant change in status occurs. The Ethics Disclosure Forms are distributed by, and then returned to the Department of Personnel.

Pursuant to Section 10 (f) of the Code, the Board has the power to render advisory opinions on “any question concerning the application of the Erie county code of ethics or article eighteen of the general municipal law.”

Section 9 of the Code provides for certain penalties to be assessed upon a violation of the Code, including an individual “knowingly and willfully” failing to file an annual disclosure statement or “knowingly and willfully with intent to deceive makes a false statement or gives information which such individual knows or should have known to be false on such statement... .”

Pursuant to Section 9 of the Code, assessment of civil penalties shall be made by the Board and the Board may refer a violation of the Code to the district attorney, which violation shall be punishable as a Class A Misdemeanor.

Section 9 of the Code also states that the Board “shall adopt rules governing the conduct of adjudicatory proceedings and appeals relating to the assessment of civil penalties herein authorized.”

Thus, pursuant to Sections 9 and 10 of the Code, the Board is charged with not only being the official repository of financial disclosure forms filed by individuals, but (1) reviewing such forms and determining, through adjudicatory proceedings and appeals subject to its own self-promulgated rules, whether individuals have falsified such forms, and (2) assessing civil penalties against violators or referring the matter to the district attorney for criminal prosecution.

Annually, department heads in Erie County government are asked by the Board to certify whom amongst their employees would be covered as employees who are in “a policy-making position in County Government.” These persons are then sent an Ethics Disclosure Form to complete.

The Board also requests a listing of those candidates for County office from the County Board of Elections as well as a list of the chairs of Erie County political parties. The Board then sends these individuals an Ethics Disclosure Form to complete.

Findings

- **The Board is presently comprised of one member.**

As noted above, Section 10 (b) of the Code requires there to be six (6) members of the Board. At no time during the scope of our review did the Board have six members.

For 2007, there were four members on the Board: Chairman David Mineo and board members Steven Schwartz, Joseph DiVencenzo and Anne S. Simet. In 2008, there were only three members of the Board: Chairman David Mineo and board members Steven Schwartz and Anne

S. Simet. Chairman Mineo was appointed in December 2004 for a five-year term, Board Member Simet was appointed in February 2004 and Board Member Schwartz was appointed in October 2007, each for approximately a five-year term. Sue Agos-Quinn was nominated for appointment as a member in June 2008 but was not confirmed by the Legislature. She is recorded in some minutes as an “ex-officio” member but other minutes do not show this designation.

Board member Simet’s term expired in February 2009. In April 2009, Maria LoTempio-Dines was appointed to the Board. In May 2009, Kim Bowers was nominated to the Board by the County Executive, but was not confirmed by the Legislature. Former Chairman Mineo’s term expired in December 2009.

The Board has asked for additional assistance from the County Executive in the form of additional members twice in their own minutes: on July 20, 2009 and on August 31, 2009. The County Executive has proposed no appointments to the Board since member Bowers in May 2009. As such, as of January 1, 2010, the Board was constituted by the following members: Steven Schwartz and Maria LoTempio Dines.⁴ Maria LoTempio-Dines later resigned.

- **The Board has no written by-laws, policies, procedures, manuals or formal guidelines.**

The Board conducts its business without any written material as a guide or support. Section 10 (g) of the Code provides “[t]he board may adopt and amend such rules of procedure as are appropriate.” However, Section 9 of the Code states the Board “shall adopt rules governing the conduct of adjudicatory proceedings and appeals relating to the assessment of the civil penalties herein authorized. Such rules shall provide for due process procedural mechanisms substantially similar to those set forth in article three of the state administrative procedure act but such mechanisms need not be identical in terms or scope.” Thus the Board is obligated to adopt rules governing adjudicatory proceedings, though it does not appear to have done so. It also does not appear to have adopted by-laws or other rules of procedure relating to any action it may have taken or the day-to-day, or year-to-year, operations of the Board.

As a result, it is not clear how the Board would act if a conflict of interest were to be discovered. It is also unclear, beyond the review of the minutes of any meeting provided, how the Board conducts a meeting and when it believes a violation of the Code has taken effect.

Additionally, it is uncertain what would constitute a quorum of Board members because the Board does not have by-laws. Generally, a quorum is a majority of members, or in this case, four (4). If four members were required to have a quorum, at no time during the period of our review was there a quorum present at a meeting of the Board.

⁴ Though beyond the scope of our review, no further appointments of Board members have been made in 2010 by the County Executive and no apparent action has been taken by the Board to select a new chair.

- **Board members believe that Board does not have the authority to investigate data disclosed within Ethics Disclosure Forms.**

Based on interviews conducted by our office of Board members, Board members have been told and believe that they do not have the authority to perform any investigation of the data provided on the forms. Therefore, they have not done so. The Board has only examined individuals that have not filed Ethics Disclosure Forms, and/or confirmed that the forms that were received were completed. No further work was performed by the Board.

The Board believes that no explicit authority exists for it to review the information on the forms. We disagree. We believe that the Board has been provided the power to review the data on the forms, to call individuals before the Board and ask those individuals questions, and to perform limited investigations. As noted above, Section 9 of the Code provides that the Board may assess penalties against an individual who “knowingly and willfully” fails to file an annual disclosure statement or “knowingly and willfully with intent to deceive makes a false statement or gives information which such individual knows or should have known to be false on such statement.”

Pursuant to that provision, the Board has been given the power to assess penalties against individuals that provide false information on a disclosure form. As the Board has been provided adjudicatory powers, and is tasked with the responsibility of assessing penalties against those who file false statements, it makes logical sense that the Board can and, when it deems it necessary, should perform investigations into the data provided on the forms. The only way the Board can determine if an individual has “knowingly and willfully” failed to file a disclosure statement, made a false statement, or has given information that the individual should have known was false would be to (1) examine the disclosure form in question to see if a statement exists on the face of the document that could be immediately determined to be false; and/or (2) perform its own investigation into the matter if a potential false statement exists, which investigation could include interviewing the individual in question or other witnesses who could attest to the matter.

It is unclear why the Board has the power to assess a civil penalty, or refer the matter to the district attorney, against an individual who files a false statement but does not have the power to review the contents of a disclosure form or interview witnesses to determine if a violation has taken place. Collecting the data on the forms but then performing no analysis on that data relegates the Board to the status of clerical help. The Board was clearly established to do more than that.

- **The Board has incomplete minutes for the years 2007 and 2009, and no minutes for 2008.**

The Board did not record minutes of meetings that took place in 2008 and has only an incomplete record of what occurred in 2007 and 2009. We have no record of what was discussed or what took place at meetings without minutes. With no contemporaneous records of minutes,

there is no proof of discussions or actions considered or taken by the Board. It is a common, accepted practice for committees/boards to take minutes of their meetings.

Further, we note that in the County's 2008 Management Letter submitted by the County's independent auditor Deloitte & Touché, LLP ("Deloitte") in late June 2009, Deloitte critically noted that the Board did not appear to have met at all during 2008.

- **The Board did not review all the Ethics Disclosure Forms in 2007, 2008 or 2009.**

Discussions with Board members indicated that the Board did not review all the Ethics Disclosure Forms filed for 2009. A member admits that "about 100" forms were reviewed. (What precisely was examined will be discussed in another finding.) There were 286 Disclosure Forms filed for 2009. As a result, an individual subject to the Code could have self-disclosed a serious conflict of interest and such disclosure would have never been discussed, pursued or even found by the Board.

There is no record of which Ethics Disclosure Forms were reviewed by the Board for 2007, 2008 or 2009.

- **For those forms the Board reviewed, we have been provided with no formal criteria on what was examined.**

Board members told us that it reviewed "about 100" Disclosure Forms for the 2009 filing year. There is no record of which forms were reviewed, but a short discussion appears in the July 2009 minutes that list what appear to be criteria used to review the forms that were examined in that year. There are no formal criteria established by the Board to determine what to examine when reviewing an Ethics Disclosure Form. As a result, we have no idea if the Disclosure Forms were examined to the same standard by the Board members present.

- **Not all required Ethics Disclosure Forms were returned for 2007, 2008 or 2009.**

For the years 2007-2009, a number of individuals failed to submit their required Ethics Disclosure Forms. A listing of the number of persons by department / board or category who did not file for 2007 and 2008 and the names of those who did not file for 2009 are provided in Appendix Four.

Local Law 4-1994, which amended the Code established a new requirement that all County employees must file within ten days of taking office/appointment, and annually on May 15 a limited employee Disclosure Form with their department head. This is not being done.

- **The Board has discovered no ethics violations for 2007, 2008 or 2009.**

The Board has referred no ethics violations to the Erie County District Attorney's Office, nor has it taken any other action indicating that it has in any way discovered any ethics violations for the period of our review.

- **Disclosure to the Clerk of the Legislature required for interests in County Contracts**

In some situations, the Code requires an individual to do more than just file an annual Ethics Disclosure Form. Section 5 (a) of the Code requires “[a]ny elected official, officer or employee or political party official” to publicly disclose any interest the person may have in any actual or proposed contract with the County by filing in writing such disclosure with the Clerk of the County Legislature as soon as the person has knowledge of such actual or prospective interest.

The law defines the term “interest” as “a direct or indirect pecuniary or material benefit accruing to a covered individual or his relative, as defined in this section.” What exactly a “material benefit” might be is not specified.

The term “relative” is defined as “such individual’s spouse, child, stepchild, stepparent or any other person who is a direct descendant of the grandparents of the reporting individual or of the reporting individuals’ spouse.”

The law does not refer to an ownership interest or membership on a “board of directors” or position as a “corporate officer” as those who need to file. As a result of these definitions, the law requiring disclosure to the clerk encompasses many situations. For example, a County employee with a spouse who works at a County vendor would technically need to file even if that position with a County vendor is not a management position.

Additionally, Section 5 (b) of the Code requires any member of the County Legislature to consider divesting any interest he or she may have in a matter that he or she must take official action on, and regardless of whether divestiture occurs, the interest must be disclosed “in a concise written statement to the clerk of the legislature.” If divestiture does not occur, the member “must abstain from participation in such action.”

No individual filed with the Clerk for the period of our review. Filings with the Clerk should have taken place because our review discovered persons who were required to file with the Clerk of the Legislature, but did not. The list of persons who should have filed but did not has been provided to the Board.

- **There is no simple mechanism for persons to report conflicts of interest to the Board of Ethics.**

The Board has no published formal mailing address, email address, web site, or telephone number nor does it publicize its meetings. Therefore, someone who wished to contact the Board or report an alleged conflict of interest would find the process difficult.

- **The Board did not issue any “Advisory Opinions” for the period of our review.**

The Board has the authority to issue advisory opinions. An “advisory opinion” is simply an opinion on whether a particular act would violate General Municipal Law or the Code. Although the Board has issued such opinions in the past, there is no record that any were requested and none were issued for the period of our review.

- **Ethics Disclosure Forms are not returned timely.**

Our review revealed that some forms were not returned before the May 15 deadline. For 2009, twelve (12) forms display a time-stamp after May 15, 2010.

- **For those employees who fit the requirements to complete an Ethics Disclosure Form, there is no evidence that they are being notified they must complete a Disclosure Form within ten (10) days of being hired.**

For 2009, we determined that four (4) employees hired after May 15 should have completed an Ethics Disclosure Form but did not submit a form within the ten (10) days required. We have no evidence that these persons were ever notified that they were required to file as per the Code.

- **Copies of the Code of Ethics are not being provided to newly-hired County employees.**

Section 13 of the Code and Article 18 of the General Municipal Law provide that a distributed copy of the Code shall be provided to “[e]very officer and employee elected or appointed” within ten (10) days of hiring. This is not being done. The responsibility for this is placed upon the County Executive and his administration and not the Board of Ethics.

- **The Board did not exercise its authority to fine those who did not comply with the Code of Ethics or General Municipal Law for the period of our review.**

Although the Board had the authority to do so, the Board did not fine anyone for filing a disclosure late, or for not filing at all for the period of our review. Appendix Four shows that not all Ethics Disclosure forms were filed for 2007 and 2008. Twenty-two (22) forms were not returned for 2009. The Board could have fined those individuals for non-compliance, but elected not to do so. Seven (7) persons filed their 2009 Ethics Disclosure Forms after we began our fieldwork on June 1, 2010. A list of those who did not file for 2009 is provided within Appendix Four.

- **Department heads should be filing a listing of who needs to file a Disclosure Form with the Board by the last day of February, without a reminder from the Board.**

The Board sends out reminders to all the County departments and divisions, reminding them to forward a list to the Board of which persons should file an Ethics Disclosure Form. The Code places that responsibility on the departments and divisions. The Board has no obligation to send out these requests.

- **Some candidates for County elective office are not filing Ethics Disclosure Forms.**

Section 4 (c) of the Code requires all candidates for elected office to file an Ethics Disclosure Form within seven (7) days of the filing of designating or nominating petitions for elected office. Section 4 (i) exempts a then-currently elected official who is simultaneously a candidate for

elected office from filing such an additional statement if the elected official complied with the requirement to file the annual May 15 Disclosure Form.

In 2009, all incumbent elected officials who were running for office filed their annual Disclosure Forms. Five (5) candidates, all non-incumbents, did not file a Disclosure Form. They are listed within Appendix Four.

- **The instructions for the Ethics Disclosure Form are not being followed.**

The Ethics Disclosure Form comes with a three-page set of instructions. The instructions clearly state that all questions must be answered, even if the answer is “Not Applicable”; what exactly the words “policy making position” entail; the due date of the form; and that anyone who believes he or she is not required to file can appeal. There were thirty-five (35) forms with the top of the first page incomplete or omitted and fifteen (15) forms with unanswered questions after page one.

- **The Board has properly abided by the law requiring that no more than three members of the Board be from the same political party.**

The law that created the Board requires that no more than three members of the Board can be from the same political party. Appointments to the Board/proposed Board members have complied with this section of the law.

For reasons of privacy, Audit will not disclose the political affiliations of the Board members.

Our Examination of the Financial Disclosure Statements

We reviewed a random sample of 25 (twenty-five) Disclosure Forms filed for calendar year 2007 and 27 (twenty-seven) for calendar year 2008. All Disclosure Forms received for 2009 were examined.

It is not the place of the Division of Audit and Control to review specific circumstances and General Municipal Law to determine if a particular action constitutes a conflict of interest. We believe that is the responsibility of the Board.

However, given our belief that the Board has a greater responsibility and power than they currently exercise, we performed tests upon the data contained within the Ethics Disclosure Forms. We performed these tests operating under the hypothesis that the Board, made up of unpaid community members, did not have the resources (personnel or tools) to do these things but would (or should) have done so if they had the resources and exercised their authority under the Code and law.

For calendar year 2007 we discovered:

- Twenty-four (24) of the twenty-five (25) reviewed were not date-stamped.
- Two (2) did not have the top of the form completed.
- Two (2) were dated after May 15th.
- One (1) was not signed.
- One (1) did not have all the questions answered.

For calendar year 2008 we discovered:

- Two (2) were not date stamped.
- Two (2) did not have the top of the form completed.
- Five (5) were signed after May 15th.
- One (1) was signed but not dated.
- Two (2) did not have all the questions completed.

For the 2009 forms, Audit recorded the names of firms listed within the Ethics Disclosure Forms and matched those firms to Erie County's list of vendors who received a County 1099 in 2009. Audit believes that such a procedure reveals, at a minimum, persons who should be asked further questions about their responsibilities within the County and with the vendors disclosed. In total we reviewed 286 forms filed for calendar year 2009. That examination revealed a list of twenty-four (24) persons with an interest that also appears on the County 1099 listing.

An employee with an interest in a County vendor is not evidence of a conflict of interest. The list of twenty-four (24) names provided is merely a catalyst for further review.

Audit also performed a search on the County Clerk's database, looking for those persons who filed an Ethics Disclosure Form who had a DBA ("Doing Business As") or equal and had not declared that on their Disclosure Form. A summary appears below:

Total number of Financial Disclosure Forms filed for 2009	286
The list of persons who have an interest in a County vendor	Twenty-Four (24)
The list of persons who have a DBA and did not disclose it	Thirty-Five (35)

The names of the persons above and the related businesses have all been provided to the Board of Ethics for their review. Confidentiality prevents those lists from being included as an appendix to this document.

In the legal action brought by the Comptroller against the Board and the County Executive to compel their cooperation in this review, the Comptroller agreed to a certain condition before State Supreme Court Justice Donna M. Siwek. Under that condition, Judge Siwek stated that Audit could not record the names of minor children, nor information on the percentage ownership or dollar amount of the interest in business listed within a Disclosure Form. *We have abided by the judge's ruling.* As a result, there may be some individuals listed within schedules provided to the Board that have a nominal interest in a County vendor or contract.

Audit found what may be potential conflicts of interest as a result of our analysis. Our communication to the Board of Ethics includes a detailed explanation with supporting documentation of these potential conflicts. We do not present them here: Audit is not the final arbiter of the Code of Ethics and should not perform the tasks of the Board of Ethics.

Audit performed other tests upon the Ethics Disclosure Forms. We examined the forms to confirm that they were properly signed and dated. For 2009, twenty-two (22) persons either did not sign, or date, or in two (2) cases neither signed nor dated, a filed Ethics Disclosure Form. One of the two (2) forms that was neither signed nor dated was notarized, though notarization is not required. Such failure to sign and/or date the form should have precluded the notary public from notarizing the form.

A listing of the twenty-two (22) individuals has been provided to the Board for their review. Confidentiality prevents that list from being included as an appendix to this document.

The forms should be date-stamped when they are submitted. This confirms that the form was submitted timely. For 2009, ninety-five (95) forms did not have a date stamp. Of those that did not have a date stamp, three (3) were dated by the signer after May 15th, the due date of the Ethics Disclosure Form. A listing of the three (3) individuals has been provided to the Board for their review. Confidentiality prevents that list from being included as an appendix to this document.

Three (3) forms were date stamped for a date prior to the date on the form as provided by the signer.

The County form has a section on the top of the first page that asks what County positions the person holds, what Boards or Committee positions they hold, and which of these are paid or unpaid. The Board commented in their minutes that this section is often omitted by those who file. We looked at all 286 forms filed for 2009 and discovered that forty (40) persons had neglected to complete this section of the form. Once again, that listing has been provided to the Board of Ethics and is not presented here to respect confidentiality.

Fifteen (15) persons failed to answer all the questions on the form. It is possible that a question left blank is an indication that the question did not apply. Many of the forms Audit examined had questions with answers such as “Does Not Apply” or “Not Relevant.” The instructions that come with the form clearly state that no questions are to be left blank.

As previously noted, twenty-two (22) persons for 2009 should have filed an Ethics Disclosure Form but did not. The list of those who did not is attached as Appendix Four.⁵

The 286 forms examined yielded 119 forms which were completely filled-in, signed, dated, time-stamped and submitted on or before the due date. This is approximately 42% of the forms filed.

⁵ On August 5, 2010, after we held our Exit Meeting, Audit was informed that Al Hammonds, the former Deputy County Executive, filed his Ethics Disclosure Form.

A complete listing of the number of Ethics Disclosure forms that were filed for 2007, 2008 and 2009, sorted by County department, is provided as Appendix Four.

It is significant that nearly all of those persons who do not submit Ethics Disclosure Forms are non-County employees.

In our review of these 2007-2009 filed Ethics Disclosure Forms, we note that the number of filed forms did not correspond with our office's understanding of the number that should have been filed. For 2007, 336 persons should have filed, but only 303 did so. For 2008, 294 persons should have filed, but 280 did. For 2009, 323 persons should have filed, but only 286 did so. For the most part, the gaps are attributable to candidates for County elective office (legislator) failing to file. In a number of instances, policymakers who separated from the County did not file their final Ethics Disclosure Form as required. However, in some cases, current employees/officers/officials simply did not file, thus raising concerns.

Recommendations

As of August 1, 2010 the Board has only one (1) member.

The Board does not have a quorum and cannot function. Until such time that additional members are appointed and confirmed the Board is incapable of performing its duties.

WE RECOMMEND that the County Executive submit names of qualified candidates to the County Legislature for consideration to serve on the Board, and the Legislature act expeditiously to either confirm or reject these appointments.

Erie County Local Law 10-1989, as amended, needs to be revised to clearly establish the authority of the Board.

Erie County first adopted a local law creating a code of ethics in April 1973. It was preceded by a board of ethics created via legislative resolution in December 1970. The original code was amended by the County Legislature in 1975. That code was replaced in its entirety by the passage of Local Law 10-1989. This local law, which is the Code, was slightly amended in 1994.

Since that time, there have been no additional amendments to the 1989 local law. Given the twenty one (21) years since, evolution of county government, changes in society, etc., we believe the Code needs to be updated and revised to (1) resolve confusion or uncertainty as to the Board's power; and (2) give the Board more powers to investigate and examine ethical issues and conflicts of interest.

The law that created the Board of Ethics needs to be strengthened to clearly establish the authority of the Board. At a minimum, the Board should be able to call before it anyone who

filed an Ethics Disclosure Form to answer questions about the information provided, and assess penalties for incorrect, incomplete or outright deceptive answers to the questions posed.

Board members believe they do not have this authority. As noted above, our office believes they already have the power, though it is not as explicitly defined as it should be. The Erie County Legislature should revise the Code to clear up this confusion and specify the explicit powers granted to the Board including, but not limited to, calling individuals before the Board to ask questions of such persons; requesting records; and to levy penalties as necessary. Though our office believes the grant of authority already exists, revising the Code to better define the powers would eliminate any question in the future.

On January 23, 2007, the Erie County Legislature's Personnel Ad Hoc Committee passed a resolution requesting that "the Board of Ethics attend the next meeting of the Personnel Ad Hoc Committee, which is charged with the review of Erie County's current Code of Ethics, to make recommendations that will strengthen and expand it in order to enact a more comprehensive and responsible set of guidelines and actions."

The Personnel Ad Hoc Committee met eleven (11) times in 2007. There is no record that the requested meeting between the Board and the Committee ever took place.

That such a meeting was requested appears to be evidence that the Committee, and thus at least a portion of the Legislature, was aware of the problems with the Board's authority in January 2007.

WE RECOMMEND that the Erie County Legislature revise the Code to expressly grant the powers noted above, powers that presently exist but are more implicit in nature.

The Board does not have the resources necessary to do its job.

There were 286 Financial Disclosure Forms completed for 2009, each with fifteen (15) questions to be answered. To research the data provided requires additional time and tools not present within the volunteer members of the Board. For example, matching County employee's disclosures with the County's 1099 listing, a test Audit performed for this review, requires access to and familiarity with the County's SAP system. None of the current Board members have this level of expertise, nor the needed County SAP access. Audit believes that the Board should be assigned additional staff resources on a permanent basis.

WE RECOMMEND that the Board be provided additional staff assistance that, at a minimum, be trained in the use of the County's SAP system and the Erie County Legislature, with the cooperation of the County Executive, consider authorizing a staff, even if only one person part-time, for the use of the Board. Allocation of such a resource would send a strong message that Erie County takes the Board of Ethics and Code of Ethics and conflicts of interest seriously.

The Board needs to publicize itself and its mission better.

Audit's work on this review has shown that many County employees do not know anything about the Board of Ethics or Code of Ethics other than the annual demand that certain individuals complete an Ethics Disclosure Form by May 15. It appears few individuals are aware of the Board's ability to issue Advisory Opinions, for example.

An excellent example of how the Board could publicize itself is found with Washington State's King County. The King County Board of Ethics has a website, <http://www.kingcounty.gov/employees/ethics.aspx>, widely considered to be a superior example of how a Board should communicate with those it oversees.

WE RECOMMEND that the Board, the Legislature and the Administration do more to publicize the powers and duties of the Board, as well as responsibilities under the Code of Ethics for those so covered. Audit suggests an annual insert in one of the Administration's many Employee Newsletters as a start. The County's ability to print notices on County paystubs may be another vehicle. Space should also be provided on the Erie County website.

WE RECOMMEND that the Board, with the assistance of the Department of Personnel and Law institute some type of ethics training for Erie County employees. The City of Buffalo has held such a training session, and we believe Erie County could benefit from such training as well.

The Board needs to examine ALL the Ethics Disclosure forms submitted in a given year.

The Board cannot simply take a sample of the forms submitted. The Board should review all the forms. By not reviewing all documents, the Board could fail to identify a serious conflict of interest, or a false statement that could be subject to a civil or criminal penalty, that should be acted upon.

WE RECOMMEND that the Board review all the forms submitted.

The Board is required to adopt rules and procedures governing the process for assessing penalties as well as the appeal process.

As per local law, the Board must adopt rules and procedures for assessing penalties for a failure to file an Ethics Disclosure Form, as well as procedures to follow should a conflict of interest be suspected or discovered. It is also good policy for an entity to have general rules of procedure/written by-laws.

WE RECOMMEND that the Board establish rules and procedures as per the Local Law as well as establish by-laws and other rules of procedure for the operation of its regular business.

The law defining an interest in a vendor with a County contract, and mandating the disclosure of such interest to the Clerk of the Legislature should be amended.

Section 5 (a) of the Code requiring any elected official, officer or employee or political party official to publicly disclose any interest the person may have in any actual or proposed contract with the County by filing in writing such disclosure with the Clerk of the County Legislature is very broad and should be reexamined.

We believe that the law was intended to expose those (1) with an ownership interest in a County vendor; (2) on a vendor's board of directors; or (3) acting as a corporate officer. In sum, those persons who have decision-making authority and would be in a position to either abuse that authority or materially benefit from a County contract. The law as written is too broad as it covers a greater field of those with an interest in a county vendor, including those who might have a relative working for a county vendor in a non-managerial position.

WE RECOMMEND that the law be amended to include only those employees (or relatives of those employees) who have an ownership interest in a county vendor, or are on the board of directors of a vendor, or are otherwise a corporate officer of a vendor as those who would need to file with the Clerk of the Legislature.

WE FURTHER RECOMMEND that the Board produce a guide as to what the term "material benefit" might mean. Whether a fixed dollar amount, a percentage of income or assets, or some other guideline, County employees should have some idea of how the term is defined.

Comments

This section covers those issues discovered that are not the responsibility of the Board.

All County employees must file an annual limited employee Disclosure Form with their department head.

As previously noted, Local Law 4-1994, which amended the Code established a new requirement that all County employees must file within ten days of taking office/appointment, and annually on May 15 a limited employee Disclosure Form with their department head. This is not being done.

WE RECOMMEND that the Commissioner of Personnel notify all department heads, including elected officials, of this requirement and that all department heads comply.

The County Executive’s administration is not providing newly-hired employees copies of the Code of Ethics and appropriate portions of New York State General Municipal Law as per the Code.

This is a requirement of the Code, New York State Law and Erie County Personnel Policies and Procedures (Chapter X, Section 6). Fulfilling this requirement would be a strong first step in publicizing the Board and its responsibilities. The Code specifies that this is a responsibility of the County Executive’s administration.

WE RECOMMEND that the County Executive direct that new hires be provided copies of the Code of Ethics and New York State General Municipal Law.

Employees who leave County service and would be required to complete a Disclosure Form should be required to submit a form before they depart.

Our work shows that many employees leave the County, but do not complete an Ethics Disclosure Form covering the period before they depart. They also then fail to do so retroactively after they have separated. Such a completed form may reveal all manner of conflicts, from post-County employment arrangements to gifts from County vendors.

WE RECOMMEND that the Department of Personnel, as part of the process of leaving County employment, collect Ethics Disclosure Forms for those who would be required to file. This may require the amending of the Code by the Legislature to effectuate such a provision.

There are inconsistencies between County departments in the number of Ethics Disclosure Forms filed and how positions that have policy making authority are determined.

An examination of Appendix Four shows that some departments list many persons with policy-making authority. Erie County’s Department of Social Services, for example, lists twenty-seven (27) persons with such authority. Contrast that figure with Emergency Services, which lists three (3), Public Works with three (3), Probation two (2) and Central Police Services one (1).

The Board of Ethics sends out a letter annually asking County department heads who should file from their department. However, the Code mandates that certain individuals must file disclosure statements, regardless of whether a department head determines an individual to be in a policy making position. Specifically, Section 3 (g) of the Code defines an ‘officer or employee’ under the Code as “[t]he head or heads of any department, division, special district or administrative unit of county government and their deputies and assistants; and such others who hold policymaking positions as annually determined by the appointing authority and set forth in a written instrument which shall be filed with the Erie County Board of Ethics during the month of February.”

The Code mandates that deputies and assistants must file. Therefore, if a department/division has a deputy or assistant, that department/division should never record just one person as filing an Ethics Disclosure Form.

The instructions provided with the form state that employees who are able to make County policy should file (emphasis in the original). An example is provided stating “those who are authorized to commit the County to a binding agreement, such as a contract or a legal settlement, or hold regulatory authority over a private interest.” This criterion is above and beyond those categories specifically listed, such as elected officials.

Clearly, department/division heads need to reassess who has policy-making authority and/or the ability to bind the County to an agreement within their departments, and who should be filing a Disclosure Form. Regardless of that fact, all deputies and assistants should be filing Disclosure Forms regardless of whether they are in fact a policy maker as defined by the department/division head.

Thirty-Five Erie County Water Authority employees filed with the Board using a form of their own creation.

Employees of the Erie County Water Authority filed a self-developed form with the Board in 2009. Based upon our research, we do not believe that any Water Authority employees need to file with the County because those individuals are required to file with the State of New York and they are not considered County employees. We encourage Water Authority senior staff to file a Disclosure with the County. It improves transparency in government. However, if Water Authority employees choose to file with the County, they should use the Board approved form. Copies of the Water Authority form, the State disclosure form and the County form are included in Appendix Three.

Individuals submitted to the Legislature for appointment to the Board are not being informed of the outcome of the approval process.

Those persons who volunteer their time and talent to serve on Erie County’s many Boards and Committees are to be commended for their service. As a simple sign of respect, if a person is nominated for a Board or Committee, they should be informed of the outcome of the process.

The 1980 Code of Ethics Compliance Review

In July 1980, then County Comptroller Alfreda Slominski issued a review of compliance with the Erie County Code of Ethics. Although the Code of Ethics has changed in the intervening 30 years, the findings listed will sound eerily familiar:

- 1) Persons subject to certain provisions of the Code were not being notified annually of the disclosure requirements by their respective department heads.
- 2) Required statements were not on file with the County Clerk for all persons subject to certain Code provisions.

- 3) Compliance with the requirement that a copy of the Code be furnished to all County officers and employees could not be verified, using the records maintained by the County Clerk.
- 4) An inconsistency exists relative to the requirement for disclosing stockholdings.

The changes to the Code have altered portions of the above findings, but the core problems remain thirty years later. Items one, two and three from the 1980 review are still applicable in the main (See the heading “**Findings**” within this document). Item four was corrected when the Ethics Disclosure Form was redesigned. This report is attached as Appendix One.

The New York State Comptroller’s Report on Ethics Oversight

In March 2010, New York State Comptroller Thomas DiNapoli released an audit entitled “Ethics Oversight in New York Municipalities.” The audit examined thirty-one (31) municipalities in New York State. The objective of the audit was to examine local governments’ ethics oversight procedures for the period January 1, 2009 to October 5, 2009. Erie County was not included as a sample government within the State audit.

The State Comptroller’s audit discovered a series of findings which include: officials who should file annual financial disclosure forms are not doing so; the information on the forms that are filed is seldom reviewed; the distribution of the various Codes of Ethics to employees is irregular; the various Boards of Ethics do not publicize themselves well; and there is little to no training on ethical issues within governments in New York State.

The State Comptroller’s findings mirror our own findings in this report. The State Comptroller’s audit can be found on the New York State Comptroller’s website at <http://www.osc.state.ny.us/localgov/audits/swr/2010/ethics/ethicsoversight.pdf>.

On April 7, 2010, following his audit and at Comptroller DiNapoli’s request, State Senator Andrea Stewart-Cousins introduced a bill, S07400A, amending General Municipal Law “in relation to conflicts of interest of municipal officers and employees (and) codes of ethics and boards of ethics.” These amendments were deemed necessary by Comptroller DiNapoli to update the General Municipal Law to reflect the passage of time and weaknesses in the current system – as well as creating a more robust, ethical atmosphere in state and local governments in New York. Among the key provisions of this legislation was a requirement that every two (2) years, the governing body of every municipality that adopts a code of ethics shall review and if necessary, update its code of ethics.⁶ We could not agree more.

Conclusions

⁶ The bill was passed by the State Senate on June 17, 2010 but it has not yet been approved by the State Assembly.

The Erie County Board of Ethics presently collects information on possible conflicts of interest within Erie County. No one is performing any analysis on that information. The Board is not adequately performing its functions as stated in the Code and has been erroneously advised that it does not have the powers to do so.

The present Code of Ethics and the law that created the Board of Ethics provides the Board the powers and authority to perform its task; however, it needs to be strengthened to eliminate the questions that have arisen as to its powers. The Board must be given explicit authority to address conflicts of interest within the County. While the grant of power already exists, the Code of Ethics should be amended to specifically state the powers that presently exist but are more implicit in nature. Transparency and increased trust in Erie County government is a goal voiced by many: a strong Board is a tool to perform both tasks.

Exit Meeting

On August 4, 2010, Audit and Comptroller Poloncarz met with Steven Schwartz, the sole member of the Board. Joseph Murphy of the Department of Personnel and Kristin Klein Wheaton of the Department of Law were also invited to attend as a courtesy relative to their departments' respective roles with the Board and Code. As a result of this meeting, and new information provided by Ms. Klein Wheaton and Mr. Schwartz, changes were made to this report.

Schedule of Appendices

Appendix One – The 1980 Ethics Report

Appendix Two – A listing of legislative appointments to the Board of Ethics

Appendix Three – Blank copies of the 2008 Financial Disclosure Form for Erie County, the 2009 New York State Financial Disclosure Form and the 2009 Financial Disclosure Statement used by the Erie County Water Authority

Appendix Four – A listing of those persons who did not file an Ethics Disclosure Form and a listing of number of forms filed.