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January 29, 2010

Mr. Robert Mendez, Executive Director  
Members of the Board of the Erie County Water Authority  
Erie County Water Authority  
295 Main St. Room 350  
Buffalo, NY 14203-2415

Report Number: S9-9-18

Dear Mr. Mendez and Members of the Board of the Erie County Water Authority:

One of the Office of the State Comptroller's primary objectives is to identify areas where local government officials can improve their operations and provide guidance and services that will assist them in making those improvements. Our goals are to develop and promote short-term and long-term strategies to enable and encourage local government officials to reduce costs, improve service delivery, and to account for and protect their entity's assets.

In accordance with these goals, we conducted an audit of 20 local public authorities throughout New York State. The objective of our audit was to determine whether these authorities' board members are receiving more compensation than is legally authorized. We included the Erie County Water Authority (Authority) in this audit. Within the scope of this audit we reviewed payroll, cash disbursements, and other relevant records to determine compensation provided to board members for the period January 1, 2007 through March 31, 2008.

This report of examination letter contains our findings specific to the Authority. We discussed the findings with Authority officials and considered their comments in preparing this report. The Authority's response is attached to this report in Appendix A. Authority officials disagreed with the findings and recommendation in our report. Appendix B includes our comments on the issues raised in the Authority's response letter. At the completion of our audit of the 20 authorities, we prepared a global report that summarizes the significant issues we identified at all of the authorities audited.

## **Summary of Findings**

We found that the Authority's Board members received \$31,750 in compensation beyond what was authorized for the period January 1, 2007 through March 31, 2008. The compensation provided includes salary, health, vision, dental and life insurance coverage, and payments in lieu of health insurance.

## **Background and Methodology**

The Erie County Water Authority (Authority) is a public benefit corporation created in 1949 pursuant to New York State Public Authorities Law. The Authority consists of three members (Board). Each member of the Authority is appointed by the Erie County Legislature<sup>1</sup> to serve three-year terms. Approximately 94 percent of the Authority's annual revenue is from charges to its customers for water service.

In order to determine the amount of compensation provided to the Board members, we interviewed Authority officials and reviewed various records including insurance invoices, payroll records, and vendor history reports for the period January 1, 2007 through March 31, 2008. Our audit procedures included identifying the amount of compensation provided by the Authority to current and prior Board members during the same period. We also reviewed cash disbursements made to Board members to determine if they would be considered compensation or reimbursement for actual and necessary expenses. We compared the total amounts of compensation paid to or on behalf of the Board members to the amounts authorized by the County Legislature.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

## **Audit Results**

The Authority's enabling statute provides that members of the Authority shall receive such compensation for their services as shall be fixed by the Board of Supervisors. In 1968, the Erie County Legislature replaced the Board of Supervisors and thus assumed its responsibilities. The term "compensation" generally refers to the total consideration paid to an officer or employee for his or her services, including salary or wages and fringe benefits. Therefore, the Authority may not provide to the members of the Board any salary or fringe benefits unless the salary and fringe benefits have been authorized by the County Legislature.

We found that, during the period January 1, 2007 through March 31, 2008, the Authority provided to four Board members more compensation than was authorized by the County

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<sup>1</sup> The Erie County Board of Supervisors appointed Authority members until they were replaced by the Erie County Legislature in 1968.

Legislature. The Board members in question include three current Board members and one other Board member who terminated board membership during 2007. We note that the salaries received by the Board members equaled the amount of compensation authorized; however, they also received health, dental, vision, and life insurance coverage, and payments in lieu of health insurance coverage as follows.

	Compensation Authorized and Received in Salary and Wages <sup>2</sup>	Health Insurance <sup>3</sup>	Vision & Dental	Life Insurance	Total Compensation Received	Compensation Received in Excess of Amounts Authorized
Member A	\$28,125	\$5,959	\$1,855	\$1,085	\$37,024	\$8,899
Member B	\$28,125	\$5,959	\$1,855	\$1,085	\$37,024	\$8,899
Member C	\$17,308	\$8,126	\$1,113	\$651	\$27,198	\$9,890
Member D	\$7,096	\$3,813	\$56	\$193	\$11,158	\$4,062
<b>Total</b>	<b>\$80,654</b>	<b>\$23,857</b>	<b>\$4,879</b>	<b>\$3,014</b>	<b>\$112,404</b>	<b>\$31,750</b>

On December 17, 1981, the Erie County Legislature passed a resolution, effective January 1, 1982, to fix the annual compensation of each Commissioner<sup>4</sup> of the Erie County Water Authority at the amount of \$22,500. During our audit, Authority officials told us that there has not been any subsequent action taken by the County Legislature with regards to Authority Board member compensation. During the period January 1, 2007 through March 31, 2008, the Authority paid its members salaries at the annual rates specified in the 1981 resolution.

The 1981 resolution, however, does not authorize the Authority to provide to its members compensation beyond the annual amount of \$22,500, in the form of fringe benefits such as health, vision, dental and life insurance. Moreover, Authority officials were unable to refer us to a resolution of the County Legislature providing for the members of the Board to receive such fringe benefits.

Authority officials told us that they do not consider insurance coverage or other benefits to be compensation. They also told us that providing such benefits to the Authority's Board members is based on past practice. We noted documentation that health insurance benefits were provided to Board members as early as 1954. However, in the absence of a resolution of the County Legislature either authorizing or signifying approval of the Authority's practice of providing Board members with fringe benefits, the Authority does not have the power to provide the Board members with such fringe benefits.

<sup>2</sup> Total compensation authorized and received for all members was pro-rated based on length of term served during our scope period.

<sup>3</sup> Includes payments in lieu of health insurance for Members A and B. Health Insurance buy-backs are paid in a lump sum in May of each year; the amount listed is only for 2007. In May of 2008 an additional \$12,803 of payments in lieu of health insurance was paid to Members A and B.

<sup>4</sup> Authority Board Member

## **Recommendation**

1. Authority management should discontinue providing Board members with total compensation in excess of the amount authorized by the County Legislature.

The Board has the responsibility to initiate corrective action. A written corrective action plan (CAP) that addresses the findings and recommendations in this report should be prepared and forwarded to our office within 90 days. For more information on preparing and filing your CAP, please refer to our brochure, *Responding to an OSC Audit Report*, which you received with the draft audit report. We encourage the Board to make this plan available for public review.

Sincerely,

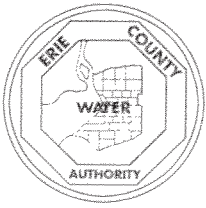
Steven J. Hancox  
Deputy Comptroller  
Office of the State Comptroller  
Division of Local Government and  
School Accountability

## **APPENDIX A**

### **RESPONSE FROM AUTHORITY OFFICIALS**

The Authority officials' response to this audit can be found on the following pages.

The Authority's response letter refers to an attachment that supports the response letter. Because the Authority's response letter provides sufficient detail of its actions, we did not include the attachment in Appendix A.



## Erie County Water Authority

350 Ellicott Square Building • 295 Main Street • Buffalo, NY 14203-2494

April 27, 2009

716-849-8484 • FAX 716-849-8463

LEGAL DEPARTMENT

### ***VIA HAND DELIVERY***

██████████ Local Government  
and School Accountability  
State of New York  
Office of the State Comptroller  
Buffalo Office  
295 Main Street  
Buffalo, New York 14203

Dear ██████████:

***Re: Response to New York State Comptroller's Preliminary Draft Report of Audit of the Erie County Water Authority***

On behalf of the Erie County Water Authority, I write to thank you for meeting with the Commissioners, Executive Director and counsel on April 7, 2009. We enjoyed the opportunity to learn the Comptroller's views regarding the recently completed audit. I believe that the meeting was very productive. You answered our questions, and we now understand the audit process.

As we expressed to you at our meeting, the ECWA has several concerns regarding the draft report. We appreciate your willingness to address these concerns.

***No Legal Authority Supports the Comptroller's Definition of "Compensation":***

The draft report finds that the ECWA's three "*Board members received \$31,750 in compensation beyond what was legally authorized for the period January 1, 2007 through March 31, 2008. The compensation provided includes salary health, vision, dental and life insurance coverage, and payments in lieu of health insurance.*" As you know, the ECWA respectfully disagrees with the draft report's finding that it may not lawfully provide these benefits to its Commissioners. The ECWA's enabling statute, Public Authorities Law §1053(1), provides that "the members of the Authority shall receive such compensation for their services as shall be fixed by the board of supervisors..."<sup>1</sup> The term "compensation" is not defined by the

<sup>1</sup> N.Y. Public Authorities Law §1053(1).



See  
Note 1  
Page 10

enabling statute, however. While it is clear that the Commissioners' compensation must be approved by the Erie County Legislature, the Comptroller's office has not cited any legal authority to support its position in the draft report that the ECWA may not provide benefits to its three Commissioners. In the absence of any legal authority prohibiting them, we believe, the ECWA may provide fringe benefits to its Commissioners as part of their compensation.

The Public Authorities Law enables the ECWA to provide benefits together with an annual salary to its three Commissioners. Given this understanding of its entitlement, the ECWA respectfully urges the Comptroller's office to reverse its finding that the ECWA may not legally provide benefits and to strike the language from its report indicating that the Authority may not lawfully provide these benefits. You have indicated that you will remove the reference to "not lawfully." We appreciate this accommodation. You have also indicated that you will revise the language to read "the ECWA lacks the authority. . ." Such language is more favorable.

See  
Note 2  
Page 10

***The Erie County Legislature Was Aware of the Commissioners' Benefits, and Acquiesced in Providing Those Benefits:***

As we also discussed, the Erie County Board of Supervisors (and later the Erie County Legislature) was well aware that the ECWA was providing its three Commissioners with compensation beyond an annual salary, and that it authorized this additional compensation. The Erie County Legislature has discussed the Commissioners' compensation at its committee meetings during the Commissioners' appointment processes, and some members of the Legislature have publicly discussed the *benefits* provided to the Commissioners as being overly generous -- but not unlawful or unauthorized.<sup>2</sup> Despite this public discussion, the Legislature has continued to condone the providing of benefits beyond salary.

See  
Note 3  
Page 10

For example, in February 2000, Erie County Legislator Gregory Olma, an outspoken critic of the ECWA publicly questioned the practice of providing health insurance and other benefits to the Commissioners in an editorial published in *The Buffalo News*:

...The issue is not merely the commissioner's [*sic*] **salary, benefits and the use of a luxury car**, or the ability to stuff a few cronies into cushy jobs... (Exhibit B) (*emphasis added*).<sup>3</sup>

All of the committee meetings and related discussion by the Erie County Legislature demonstrate that the Commissioners' benefits were well known to the Legislature

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<sup>2</sup> See, Exhibit A attached hereto.

<sup>3</sup> There have been many articles in other publications stating that the ECWA's three Commissioners have been provided benefits beyond their annual salary. Several Samples of articles from the Buffalo News are attached hereto as Exhibit A).

and the public. The Legislature’s committee meetings also confirm that the Legislature intended to provide these benefits to the Commissioners as part of their compensation.<sup>4</sup>

See  
Note 4  
Page 10

While the Legislature has not formally approved a resolution stating the exact amount of the Commissioners’ health or vision insurance coverage or any payment in lieu of such coverage, such a resolution is not necessary to approve such benefits. New York Courts have consistently recognized that implied promises by a public sector entity may bind the entity to provide an employee benefit -- even in the absence of a formal resolution by the public entity.<sup>5</sup>

See  
Note 5  
Page 11

Because the health care benefits have been provided to the three Commissioners for nearly six decades, and because the Legislature has openly approved this practice, the ECWA has the legal ability to provide the benefits in question. Again, we appreciate your agreement to remove the language in its report that the ECWA may “not lawfully” provide benefits to its Commissioners.

***We Recommend Additional Changes to the Audit Report***

We discussed these additional proposed changes at our recent meeting.

You have agreed to remove the reference to the General Municipal Law. The Comptroller’s draft report states that “[t]he Erie County Water Authority has the responsibility to initiate corrective action,” and demands that a “written corrective action plan (CAP) that addresses the findings and recommendations in this report should be prepared and forwarded to [the Comptroller’s] office within 90 days, pursuant to Section 35 of the General Municipal Law.”

As we discussed on April 7, 2009, the ECWA would like this language modified to reflect that the Comptroller may only make recommendations to it under the Public Authorities Law. We suggest the following language be substituted for the above cited paragraph:

See  
Note 6  
Page 11

*We recommend that the Erie County Water Authority take corrective action regarding the Comptroller’s findings within the next 90 days.*

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<sup>4</sup> The Commissioners have received these benefits *before and after* previous audits by the New York State Comptroller’s office. In 1989, the New York State Comptroller conducted an extensive audit of the ECWA, but did not recommend that the Commissioners forfeit their benefits. Nonetheless, the Comptroller’s apparent recognition that these benefits were lawful further demonstrates that these benefits were provided in the public’s view, and not concealed by the ECWA.

<sup>5</sup> See, *Emerling v. Village of Hamburg*, 255 A.D.2d 960 (4<sup>th</sup> Dept., 1998); *May v. Ballston Spa Central School District*, 170 A.D.2d 920 (3<sup>rd</sup> Dept., 1991).

To further memorialize our position, we object to the language contained in the Preliminary Draft Report's section entitled "Summary of Findings." Specifically, the Authority objects to the first sentence of that paragraph, which currently reads, "*We found that the Authority's Board members receive \$31,750 in compensation beyond what was legally authorized for the period January 1, 2007 through March 31, 2008.*" We suggest the Comptroller to replace this sentence with the following:

*"We found that the Authority's Board members received \$31,750 in compensation beyond what was expressly authorized by the Legislature for the period January 1, 2007 through March 31, 2008."*

You have agreed to change the last sentence of the "Audit Results Section" which currently reads, "*However, in the absence of a resolution of the County Legislature either authorizing or signifying approval of the Authority's practice of providing Board Members with fringe benefits, the Authority may not lawfully provide the Board members with such fringe benefits.*"

To reflect that "compensation" is not defined by the enabling statute -- Public Authorities Law §1053(1), we suggest the following replacement language:

*However, in the absence of a resolution of the County Legislature either authorizing or signifying approval of the Authority's practice of providing Board Members with fringe benefits, the ECWA lacks the authority to provide the Board members with such fringe benefits."*

On behalf of the ECWA, I want to thank you for allowing us to provide this response to the Comptroller's draft report, and I welcome any additional inquiries that the Comptroller may have regarding this issue. If you have any questions, please contact me at 716.849.8429. Thank you.

Very truly yours,

ERIE COUNTY WATER AUTHORITY



Mark J. Fuzak  
Counsel

MJF:tf  
Enclosures

## **APPENDIX B**

### **OSC COMMENTS ON THE AUTHORITY'S RESPONSE**

#### Note 1

The ECWA's enabling legislation provides that the members of the Authority "shall receive such compensation as shall be fixed by the board of supervisors [now the County Legislature]," but does not define the term "compensation." The Comptroller's Office believes that the term "compensation" as used in the ECWA's enabling legislation includes fringe benefits because we have long maintained that the term "compensation" generally connotes the total consideration paid to an officer or employee for his or her services, including salary or wages and fringe benefits (see, e.g. 2009 Opns St Comp No. 2000-9, 25; 1988 Opns St Comp No. 88-64, p 126; 1987 Opns St Comp No. 87-33, p 52; 1987 Opns St Comp No. 87-8, p 14; 1985 Opns St Comp No. 85-13, p 15). If the ECWA's contention is correct, that the term "compensation" as used in its enabling legislation does not include fringe benefits, then the Authority would have no statutory basis for providing fringe benefits to its Board members.

#### Note 2

Language modifications to the draft report were discussed with the ECWA Executive Director subsequent to our April 7 meeting. Although we agreed to some modifications, they in no way diminish our conclusion that benefits were provided to the Authority's Board members without authority from the County Legislature as required by the ECWA's enabling legislation.

#### Note 3

The ECWA's enabling legislation requires the compensation provided to the Authority's Board members to be "fixed" by the County Legislature. The County legislature fixes the Board members' compensation through a legislative enactment, such as adoption of a resolution. Even if there is evidence that the County Legislature was informed of the compensation provided by the ECWA to its Board members, ordinarily acquiescence (i.e., tacit or passive acceptance of a matter) by a legislative body does not constitute ratification by that body.

#### Note 4

The Comptroller's audit of the ECWA in 1989 did not include the specific objective of this audit which was to examine whether the Authority's Board members were receiving more compensation than is legally authorized.

Note 5

As noted above, the County Legislature must fix the Board members' compensation through a legislative enactment, such as adoption of a resolution. The court cases cited by the ECWA are inapplicable in this instance because the cases involve benefits provided by municipalities which the municipalities had authority to provide. Here, the ECWA lacked authority to provide benefits to its Board members because the County Legislature never acted to authorize the Authority to provide the benefits.

Note 6

We have not implemented the additional wording changes requested by the ECWA. We believe that corrective action plans (CAPs) are a good management tool for all government entities. Written CAPs require a Board and its management to work together to respond to audit findings and recommendations. They also allow the public to assess how the authority plans to respond to an audit's recommendations. The other suggested changes do not improve our stated positions.