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COUNTY OF ERIE

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May 22, 2012

Hon. Edward A. Rath, III
Hon. Lynne M. Dixon
Erie County Legislature
92 Franklin Street, 4th Floor
Buffalo, New York 14202

Re: Request for Opinion regarding 19D-5 (2011)

Dear Legislators:

Through correspondence received by this office on May 9, 2012, you have asked for an opinion with respect to portions of what is known as Communication 19D-5 (2011), as amended on May 3, 2012 (the "Resolution"). Below you will find a point by point response to your inquiries.

Question #1: "The resolution is a departmental communication that is not sponsored by an elected official. Can it be approved by the legislature in its current form?"

Answer: To clarify, the Resolution is not a departmental communication since the Erie County Community Corrections Advisory Board (the "Board") is not a department of Erie County Government. It is an advisory board created pursuant to Section 2305 of the Erie County Charter ("Charter") and its functions and procedures are more fully described in Section 19.01 of the Erie County Administrative Code. The Resolution should be identified as a "miscellaneous" communication. In addition, the legislature cannot speak for the Board and memorialize its recommendation. The first whereas clause appears to be written in the Board's voice while that which follows purports to be in the voice of the legislature. For the reasons stated throughout this response the Resolution cannot be approved in its current form.

Question #2: "The first resolved clause recommends the position of Ombudsman be created in the 2012 budget. The second resolved clause states that the position is created. Creation of the position would be amending the 2012 budget. However, the resolution includes no budgetary information. Is this proper and would the resolution be effective without such language?"

Answer: Should the legislature choose to adopt a resolution creating an Ombudsman, it is the Department of Law's opinion that, in order for it to have legal effect, such resolution must contain reference to a specific funding source and specific budget lines showing the

appropriations and revenues for the position. In addition, please keep in mind that the Charter prescribes that only the County Executive may initiate appropriations.

Question #3: "The third through seventh resolved paragraphs include certain duties of the Ombudsman. Are these duties exclusive to the Ombudsman, or are they duplicative and perhaps competing with other officials, including elected officials? The seventh resolved in particular gives the Ombudsman the power to facilitate fair settlements. Would this resolution have the effect of changing duties assigned by the Erie County Charter to elected officials? If so, would this require a revision to the Erie County Charter?"

Answer: It is the Department of Law's opinion that the Resolution in its current form could arguably transfer or otherwise dilute the Sheriff's authority and power to investigate complaints and facilitate fair settlements. Further specificity with respect to the nature and extent of an Ombudsman's power and authority would be needed to determine if a Charter amendment via Local Law would be required and whether or not a referendum would be necessary pursuant to Section 2.03 of the Erie County Administrative Code.

Question #4: "The eighth resolved paragraph states that the Ombudsman may not be an employee or member of the Erie County Sheriff's Office. This would infer that the Ombudsman may otherwise be an Erie County employee. Is it proper for an Erie County employee to hold multiple positions with Erie County? If so, what guidelines must the employee observe?"

Answer: Under certain limited circumstances it is permissible for an employee of Erie County to hold multiple positions within Erie County Government when such work does not conflict and the work times do not intersect or overlap. For instance, please see the Erie County Comptroller's Review of County-Wide Dual Employment published on July 26, 2011 which discussed examples of dual employment. The review can be found at: http://www2.erie.gov/comptroller/sites/www2.erie.gov.comptroller/files/uploads/7-26-11%20Comptroller%27s%20Review%20of%20County-Wide%20Dual%20Employment.pdf.

Question #5: "The tenth resolved paragraph states that the Ombudsman will be appointed by the Erie County Community Corrections Advisory Board. Is it proper for an advisory group made up of non-elected and non-employee members to make hiring decisions for Erie County?"

Answer: Section 2305 of the Charter provides advisory boards no authority to make hiring decisions for Erie County.

Question #6: "The resolution does not discuss a term of office for the Ombudsman or termination procedures for the position. If passed without such information, what would be the default provisions?"

Answer: There are no default provisions which would govern in this instance. In order to have legal effect, a resolution creating an Ombudsman position would need to identify the category of position being created. That is, managerial-confidential or unionized, termed or at the pleasure, and the position would need to specify the job group and step, pay scale, etc...

Question #7: "The final resolved paragraph states possibilities for funding the position, including the commissary fund and inmate telephone funds. Is it proper, pursuant to 9 NYCRR 7016.1(a), for the Sheriff to not maintain and operate this fund?"

Answer: According to the New York State Code of Rules and Regulations Title 9 Section 7016.1, only the Sheriff has discretion over expenditures from the commissary fund. Should the legislature choose to adopt a resolution creating an Ombudsman, an appropriate funding source would have to be properly designated.

Very truly yours,

MICHAEL A. SIRAGUSA, ESQ.
Erie County Attorney

cc: Hon. Timothy R. Hogues
Chair, Public Safety Committee