



STATE OF NEW YORK
OFFICE OF THE STATE INSPECTOR GENERAL
Final Report
August 18, 2011

SUMMARY OF FINDINGS/RECOMMENDATIONS

The Inspector General found that three New York State Thruway Authority managers, Walter Byers, Timothy O'Brien, and Steven Dabney, supervised employees who were related to them and engaged in other conduct with respect to their relatives which implicated the anti-nepotism provision of the Public Officers Law and Thruway policy.

The Inspector General further determined that the Thruway Authority failed to comply with its Executive Instruction 2007-10, which requires that a memorandum be prepared when a relative of an existing employee is recommended for a position at the Thruway Authority. The Inspector General found that the Thruway Authority does not include in such memoranda all information required by this instruction, has no systemic method for identifying applicants as relatives of existing employees, and does not retain such memoranda in a meaningful manner. The Inspector General therefore recommends that the Thruway Authority review its policies and practices with regard to documenting and evaluating the hiring of employees' relatives.

The Thruway Authority advised the Inspector General that it is taking steps to address the issues identified in the investigation.

ALLEGATION

In March 2010, the Inspector General received a complaint alleging that Thruway Authority Buffalo Division supervisors Walter Byers, Timothy O'Brien, and Steven Dabney, who are all brothers-in-law, hired and supervised family members, identified as Shawn O'Brien and Steven Louth, and afforded these relatives preferential treatment including the assignment of overtime.¹

¹ The complaint also named a third employee alleged to have a relative as a supervisor and to have been hired without a required commercial driver license. The Inspector General determined that those allegations were unfounded.

SUMMARY OF INVESTIGATION

Background

The Thruway Authority operates the 570-mile Thruway system of highways and bridges across New York State. The Thruway Authority's Buffalo Division employs a workforce of more than 1,100 full- and part-time maintenance workers, toll collectors, and management and administrative staff. Organizationally, the Buffalo Division includes a division maintenance section, six highway maintenance sections, and a bridge maintenance section. During the summer months, the maintenance sections are responsible for grass mowing, road and toll facility repairs, and general maintenance activities. The primary responsibility of maintenance staff in the winter is snow and ice removal. The bridge section is responsible for maintaining bridges, viaducts, and overpasses. Each of the sections, consisting of approximately 25 employees, is supervised by a Maintenance Supervisor II who reports to a Highway Maintenance Engineer.

Both the New York State Public Officers Law and Thruway Authority policy address the employment of family members and prohibit employees from engaging in various specific internal agency functions involving their relatives. Public Officers Law § 73 defines an individual's "relative" as "any person living in the same household as the individual and any person who is a direct descendant of that individual's grandparents or the spouse of such descendant." Thruway Authority Executive Instruction 2007-10 (Ethical Employment Decision Practices) expands the definition of "relative" to include "step" and "in-law" relatives of the employee or the employee's spouse.

Public Officers Law § 73(14)(a), the state's anti-nepotism provision, restricts the activities of employees with respect to their relatives as follows:

No statewide elected official, state officer or employee, member of the legislature or legislative employee may participate in any decision to hire, promote, discipline or discharge a relative for any compensated position at, for or within any state agency, public authority or the legislature.

Thruway Authority Executive Instruction 2007-10 mirrors this prohibition, adding a recusal requirement:

No Authority/Corporation employee may participate in any decision to hire, promote, discipline or discharge a relative of the employee for any compensated position at, for or within the Authority/Corporation, any State agency, public authority or the Legislature.

* * *

If an employment matter arises involving a relative of the employee, then the employee must advise his/her supervisor of the relationship, and must be recused from any and all discussions or decisions regarding the matter.

The state's Code of Ethics as expressed in the Public Officers Law also is relevant to the findings of this investigation. Public Officers Law § 74(3)(h) states:

An officer or employee of a state agency, member of the legislature or legislative employee should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.

Investigation Finds Supervisors Managed and Evaluated Subordinates Who Are Their Relatives

The Inspector General's investigation confirmed that the supervisors named in the complaint, Walter Byers, Timothy O'Brien, and Steven Dabney, are brothers-in-law, and that the three officials supervised subordinate employees who are their family members as defined by Thruway policy and/or the Public Officers Law. Timothy O'Brien's son, Shawn O'Brien, was hired as a Thruway Maintenance Worker in 2000 after working as a temporary laborer. Shawn O'Brien was assigned to the Buffalo maintenance section, where he was supervised by his uncle, Walter Byers, and later by his father. Steven Louth is Dabney's nephew by marriage.² After holding a temporary position, Louth was hired as a Thruway Maintenance Worker in 2003 and supervised by Dabney until Dabney's retirement.³

As supervisors, Byers, O'Brien, and Dabney routinely engaged in such management functions as conducting yearly performance evaluations of subordinate employees, assigning overtime work, and issuing counseling memoranda in instances of misconduct by subordinates. As discussed below, these activities at times involved judgments and decisions affecting Byers's, O'Brien's, and Dabney's family members who were subject to their supervision. Although neither the Public Officers Law nor Thruway policy expressly prohibits "supervision" of a relative, such supervisory actions seemingly implicate Public Officers Law § 73(14)(a) and Thruway Authority Executive Instruction 2007-10's preclusion against involvement by an employee "in *any* decision to hire, promote, discipline or discharge a relative" [emphasis supplied]. As these activities also created the potential for conflicts of interest and abuses of authority, they also arguably violated Public Officers Law § 74(3)(h). Finally, aside from the possible violations of statutory and regulatory prohibitions, permitting these individuals to have any role in overseeing the employment of their family members created an appearance of impropriety, opened them to charges of favoritism by other employees, and compromised their authority.

² Louth is married to the daughter of Dabney's wife's sister.

³ Prior to the commencement of this investigation, Byers retired as Buffalo section supervisor and was replaced by Timothy O'Brien on January 22, 2009. Timothy O'Brien and Dabney retired during the pendency of this investigation.

Verification of Applicant's Minimum Qualifications

The Inspector General found that Dabney, while a supervisor in the Buffalo maintenance section, was involved in verifying the minimum qualifications of Louth, his nephew by marriage, who was applying for a Thruway Maintenance Worker position in the same section in 2003. Specifically, in a May 8, 2003 memorandum to Joseph Bifaro, the Buffalo Division administrative officer, Dabney confirmed Louth's qualifications for the position, resulting in Louth's hiring. The Thruway Maintenance Worker position is a non-competitive job which does not require a candidate to successfully complete a competitive examination, only that the applicant possess specified minimum qualifications. Consequently, verification of minimum qualifications is a critically important step in the hiring process.⁴

When queried by the Inspector General as to whether she had been aware of the familial relationship between Dabney and Louth, Thruway Authority Personnel Director Traci Horwedel advised that she was unaware until informed by the Inspector General during that interview and declared that a relative should not verify the qualifications of a job candidate. Horwedel's lack of knowledge is an indication of flaws in the Thruway Authority's system of identifying potential conflicts of interest regarding employee relatives, as explained in greater detail later in this report.

Completion of Performance Evaluations

Similar to other state agencies, new hires at the Thruway Authority must successfully complete a probationary period prior to appointment as permanent employees. Thereafter, the employees are subject to annual performance evaluations which may affect their continued employment as well as future promotions and related decisions.

The Inspector General found that Dabney, in his supervisory capacity, reviewed Louth's work during his probationary period and later conducted Louth's annual performance evaluations, both of which potentially affected Louth's ability to be hired by and promoted within the Thruway Authority. In each instance, Dabney judged Louth's work as satisfactory.

Similarly, Shawn O'Brien's annual performance evaluations were conducted first by his uncle and later by his father, each of whom judged his work to be satisfactory. Asked by the Inspector General if the practice of supervisors conducting evaluations of subordinates who are family members created a problem, Bifaro responded, "Potential one, sure." In actuality, the problem is far greater than "potential" as characterized by Bifaro because, at the outset, any employee evaluation conducted by a relative would open the evaluator to an accusation of bias.

⁴ According to Bifaro, since 2003, when Louth was hired, verifications of applicants' minimum qualifications have been conducted by his office and not verified by supervisors.

Issuance of Counseling Memoranda

As supervisors, Byers, Dabney, and O'Brien also participated in the Thruway Authority's disciplinary process. In instances of employee misconduct, supervisors take the first step that can result in disciplinary action by issuing a formal Job Counseling Memorandum (JCM) to the offending employee. JCMs are generally issued by the employee's supervisor, at the supervisor's discretion. Upper level managers may also direct a supervisor to issue a JCM, when the situation warrants. Although a JCM is not in itself disciplinary, disciplinary action begins with the issuance of a JCM. After a JCM is issued, a copy is sent to Thruway Authority administrative staff for review to determine whether disciplinary action is warranted.

When interviewed by the Inspector General, both Timothy O'Brien and Dabney acknowledged their responsibility for identifying and addressing misconduct by their subordinates, including family members, through the issuance of JCMs. Although he admitted that he never had issued a JCM to his son, Shawn O'Brien, Timothy O'Brien claimed he would have done so if necessary, stating "That's boss and employee, not father and son . . . that's the way it's got to be."

While the ultimate disciplinary decision is made at a higher administrative level than the front-line supervisor, the initial reporting of conduct that may warrant disciplinary action rests with this supervisor. At a minimum, this responsibility challenges the supervisor's objectivity when managing a relative and potentially creates the perception by co-workers of favoritism.

The Inspector General asked Horwedel and Bifaro whether they had concerns about such situations. Both suggested unsatisfactory solutions to this untenable situation: Horwedel responded that an intermediate supervisor should issue the JCM to the relative's subordinate; Bifaro similarly offered, "I would hope that if we were in a position where a supervisor needed to counsel his son that he would recuse himself." Both conceded, however, that the Thruway Authority lacks specific policy addressing these situations. Furthermore, Horwedel's suggested practice of an intermediate supervisor issuing JCMs to relatives of their immediate supervisor creates an obviously difficult situation for the intermediate supervisors. The proposed practice also does not address the need for objectivity and the possible perception of favoritism.

Assignment of Overtime

The Buffalo maintenance sections have implemented procedures for the equitable assignment of overtime by which overtime is assigned from a list in seniority order and requires that the entire list must be rotated through before returning to the top. If an employee declines the offer of an assignment, it is considered an overtime opportunity taken and the supervisor moves to the next employee on the list. Similarly, if a supervisor is unable to contact an employee, he also moves to the next person on the list.

The Inspector General also examined overtime assignments in the sections supervised by O'Brien and Dabney. Both supervisors explained that they adhered to the procedures described above. A review of the overtime records showed that Shawn O'Brien received overtime consistent with other Thruway Maintenance Workers. The Inspector General found, however, that the amount of overtime Louth worked in 2009 was well above co-workers in his section. The Inspector General asked Dabney why Louth had more overtime hours in 2009 than other workers with more seniority, and Dabney replied, "Because he never turns it down." Although Dabney's explanation is difficult to verify in retrospect, it further illustrates how supervision of a relative is problematic and, at a minimum, can create the appearance of favoritism.

Thruway Authority Fails to Follow Anti-Nepotism Provision of Agency Policy

In addition to the concerns raised above, the Inspector General found that the Thruway Authority failed to comply with a provision of its own policy intended to safeguard against nepotism in hiring decisions. Further, the Inspector General determined that this deficiency was not restricted to the Buffalo sections, but existed statewide.

Thruway Authority Executive Instruction 2007-10 states, in pertinent part, that in instances when an individual recommended for hiring is a relative of an employee, "the recommendation must be accompanied by a memorandum, from the Department Head/Division Director (or designee) to the Director of Personnel for review and approval, *explaining the rationale for selecting the relative of the employee over other candidates*⁵ [Emphasis supplied]. Horwedel advised that the recommendation and accompanying memorandum are forwarded to her in Albany, and that her approval is required before the hiring can occur.

Bifaro advised the Inspector General that either he or an assistant prepares what he termed the "Mother May I" memorandum which is forwarded, usually by e-mail, to Horwedel. According to Bifaro, the memoranda typically state "something along the lines of '[the applicant] has applied for this position . . . He has a relative . . . who works in a different department.' " Bifaro added that as the Buffalo Division attempts to avoid placing an individual in a unit where his or her relative is the supervisor, he typically states in the memorandum that there will be no supervisory conflict.

The Inspector General requested copies of all memoranda submitted pursuant to the Executive Instruction for any employee relatives hired within the past two years at the Buffalo Division. The Thruway Authority only provided two memoranda, both in e-mail form, for Thruway Maintenance Workers Keith Durski and Daniel Fechter. Bifaro advised the Inspector General that, although he was unable to locate any others, he was sure additional memoranda existed.

⁵ Executive Instruction 2007-10 superseded 97-10, which included a similar provision.

The Inspector General showed Horwedel and Bifaro the two memoranda. Specifically, the e-mail dated July 31, 2009, regarding the hiring of Keith Durski, stated in its entirety:

Traci [Horwedel], We are requesting authorization to hire Keith Durski as a seasonal laborer for Silver Creek Bridge. His cousin is, Henry Durski, a permanent TMW at Buffalo Br./Mtce. Henry is not a supervisor, so there will be no supervisory contact. Also, they are working in different units. Thank you.

Horwedel's e-mail response stated:

This is fine.

The e-mail dated May 7, 2003, regarding the hiring of Daniel Fechter stated in its entirety:

Traci, Please review and advise if we may hire Daniel Fechter as a seasonal laborer in Inventory. Dan's father, Cal Fechter is DMS 2, Division Highway Maintenance. As Mr. Padwater indicated Dan will not be working under Cal. Thank you, Karen

Horwedel replied:

Go ahead.

Horwedel confirmed that she approved the hiring of Durski and Fechter. The Inspector General noted that in both of the e-mails (Durski and Fechter), the information that was conveyed was that they would not be working for their relative. The Inspector General asked Horwedel if that information is primarily what she is looking for upon receipt of the memoranda. She answered, "Primarily." Horwedel said that the memoranda that were sent on behalf of Durski and Fechter are typical of those received for other relative hires. Bifaro said that these two memoranda were "very representative" of the other memoranda sent over the years. Bifaro added that they were, "Pretty much standard."

Notably, these memoranda fail to include the required "rationale for selecting the relative over other candidates." When questioned on this shortcoming, Bifaro said that "this has pretty much been it," indicating that the Thruway Authority Personnel Office does not require additional information. Bifaro explained that, "usually when we're this far along in the recruitment process . . . we don't have anybody else." When Bifaro was asked if he has ever sent an explanation as to why a candidate was being hired over another candidate, Bifaro replied, "No, I have not." The Inspector General queried Bifaro whether a memorandum has ever been returned requiring more of an explanation; he answered, "Not to my recollection, no." When the Inspector then showed Bifaro the

relevant Thruway Authority policy, he responded, “As you bring it to my attention, yeah, [it] probably should” be included.

During an interview with the Inspector General, Horwedel stated that she believed that the memorandum did not require additional information for fulltime positions, such as a Thruway Maintenance Worker. However, when asked if the “rationale for selecting the relative over other candidates” should be included in the memorandum sent to her attention pursuant to the Executive Instruction, she said that it should. Horwedel later added that, “Some might go into more details, stating that, you know, they need somebody now, this person is willing and able to go at moments notice . . . but yes.” Horwedel subsequently stated, “I believe I have asked the [Buffalo] Division to get more specific.”

The Inspector General subsequently requested the memoranda submitted to the Thruway Authority from divisions other than Buffalo. The Thruway Authority provided 37 additional e-mail memoranda submitted from 2006 to the present. The Inspector General’s review of these memoranda showed that Thruway Authority personnel similarly failed to properly complete the memoranda required by Executive Instruction 2007-10. Additionally, the 37 e-mails established that the Thruway Authority’s Personnel Office routinely accepted the deficient memoranda. The majority of these memoranda were similar to the two examples cited above.

These memoranda primarily advised that the applicant would not be supervised by the applicant’s relative; none included a “rationale for selecting the relative over other candidates.” A few contained cursory statements such as that the need to fill the position was pressing or the applicant was immediately available. However, of the 37 reviewed, the memoranda that came closest to meeting the requirements of the Executive Order merely stated that the applicant was the “only qualified applicant,” was the “better candidate for the job,” or that there was a “lack of available applicants.”

Deficient Job Application

The Inspector General also found that the Thruway Authority’s job application is deficient in that it does not inquire whether an applicant has any relatives currently employed by the Thruway Authority.⁶ Authority personnel primarily rely on recognizing surnames or word of mouth as the method of determining which applicants require the submission of the memorandum discussed above. The Authority does not employ any systemic method for identifying prospective employees as relatives of existing employees.

When asked how he knows that an applicant is a relative, Bifaro responded that he relies on supervisors to advise him or, in the event he recognizes a name, he makes his own inquiry. Horwedel indicated that she did not consider the lack of such a question on

⁶ Horwedel did point out that during the appointment review by the Equal Opportunity Office there is a form which is completed by Authority personnel that asks for “referral source” and that one of the choices is “family member.” This, however, presumes that the Authority personnel are aware of the relationship.

the job application a problem, stating, “To be honest with you, I don’t think anybody’s not forthcoming.” However, as discussed above, Horwedel was unaware of the familial relationship between Dabney and Louth. This oversight provides an example of a situation in which an inquiry as to family relationships on the job application form may have identified their relationship and prompted the need for the required memorandum. The lack of a reliable method to identify candidates whose applications require submission of the mandated memorandum is an obvious weakness and impairs the Thruway Authority’s implementation of Executive Instruction 2007-10.

Failure to Retain Memoranda

The Inspector General further determined that the Thruway Authority failed to retain the memoranda required by the Executive Instruction, relying instead on individual e-mail archives. As stated above, Horwedel and Bifaro both stated that the memoranda were generally in the form of e-mail, and that they were retained in their respective e-mail archives which are periodically purged. Horwedel stated that memoranda are destroyed based on the Thruway Authority’s record retention schedule. She explained that the Thruway Authority is required to keep documents, such as the memoranda, for four years, according to the State Archives schedule. Horwedel, however, was not sure how long her e-mail archives were maintained. When asked if the memoranda that she was unable to locate were eliminated from her e-mail archives, Horwedel answered, “I believe that’s true; the e-mail process, that it just dumps out.” Horwedel advised the Inspector General that her office does not print the memoranda nor does it retain them in employee personnel files.

FINDINGS AND RECOMMENDATIONS

The Inspector General found that three New York State Thruway Authority managers, Walter Byers, Timothy O’Brien, and Steven Dabney, supervised employees who were related to them, and identified actions by the supervisors which arguably violated the anti-nepotism provision of the Public Officers Law and Thruway policy. All three supervisors have retired from state employment, thereby precluding agency disciplinary action. The Inspector General is providing a copy of this report to the New York State Commission on Public Integrity⁷ for review.

The Inspector General further determined that the Thruway Authority failed to comply with its Executive Instruction 2007-10, which requires that a memorandum be prepared when a relative of an existing employee is recommended for a position at the Thruway Authority. The Inspector General found that the Thruway Authority does not include all information required by this instruction in the memoranda, has no systemic method for identifying applicants as relatives of existing employees, and does not retain

⁷ On August 15, 2011, Governor Andrew M. Cuomo signed the Public Integrity Reform Act of 2011, a new ethics statute dissolving the investigative and enforcement functions of the Commission on Public Integrity but continuing its complaint and referral intake functions until a new Joint Commission on Public Ethics (J-COPE) is formed. Any action on this case through this referral would be at the discretion of the new J-COPE once formed.

such memoranda in a meaningful manner. The Inspector General recommends that the Thruway Authority review its policies and practices with regard to documenting and evaluating relative employee hires.

Response of the Thruway Authority

The Thruway Authority advised the Inspector General that it is taking steps to address the issues identified in the investigation. The Thruway Authority's response appears on the following page.



Howard P. Milstein
Chairman

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Thomas J. Ryan
Acting Executive
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August 16, 2011

Inspector General Ellen Biben
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RE: NYS IG 0947-041-2009

Dear Ms. Stamm:

The New York State Thruway Authority is in receipt of the above referenced draft report dated August 2, 2011, related to Authority managers who were found to have supervised employees who were their family members.

The Report's Findings and Recommendations point out a number of instances where Authority policy concerning the employment of relatives was not followed. To the extent that the procedures utilized by staff demonstrated systemic failures, those items outlined in the Report are being addressed. The Authority's Personnel Office has already begun to take action on a number of the issues raised, and the Authority will continue to do so until all concerns mentioned in the draft report are dealt with.

A directive will be issued to staff shortly that reemphasizes our commitment to adhere to the policies and instructions promulgated by the Authority. Thank you.

Very truly yours,

A handwritten signature in blue ink that reads "Tom Ryan".

Thomas J. Ryan