

NOTICE: In compliance with AB 361 (2021), the meeting scheduled below will be accessible via Zoom video conferencing.

- Members of the public may participate in the meeting by clicking on the following Zoom link:
<https://us02web.zoom.us/j/89150541284>
- You may also participate via telephone by dialing 1(669) 900-6833 and entering Meeting ID number 891 5054 1284.

ITEM NO. 14

PERSONNEL COMMITTEE AGENDA

Tuesday, November 15, 2022
9:00 a.m.

**East Bay Dischargers Authority
2651 Grant Avenue, San Lorenzo, CA 94580**

Committee Members: Cutter (Chair), Duncan

P1. Call to Order

P2. Roll Call

P3. Public Forum

P4. Brown Act Review

(The Committee will discuss legal counsel's annual review of the Brown Act.)

P5. Review of Commissioner Compensation Policy and Set Rate for 2023

(The Committee will review the Policy and discuss rate considerations.)

P6. Adjournment

Any member of the public may address the Commission at the commencement of the meeting on any matter within the jurisdiction of the Commission. This should not relate to any item on the agenda. It is the policy of the Authority that each person addressing the Commission limit their presentation to three minutes. Non-English speakers using a translator will have a time limit of six minutes. Any member of the public desiring to provide comments to the Commission on an agenda item should do so at the time the item is considered. It is the policy of the Authority that oral comments be limited to three minutes per individual or ten minutes for an organization. Speaker's cards will be available in the Boardroom and are to be completed prior to speaking.

In compliance with the Americans with Disabilities Act of 1990, if you need special assistance to participate in an Authority meeting, or you need a copy of the agenda, or the agenda packet, in an appropriate alternative format, please contact Juanita Villasenor at juanita@ebda.org or (510) 278-5910. Notification of at least 48 hours prior to the meeting or time when services are needed will assist the Authority staff in assuring that reasonable arrangements can be made to provide accessibility to the meeting or service.

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In compliance with SB 343. related writings of open session items are available for public inspection at East Bay Dischargers Authority, 2651 Grant Avenue, San Lorenzo, CA 94580. For your convenience, agenda items are posted on the East Bay Dischargers Authority website located at <http://www.ebda.org>.

**The next Personnel Committee meeting will be held
Tuesday, January 17, 2023 at 9:00 a.m.**

ITEM NO. P4 BROWN ACT REVIEW

Recommendation

Receive and review the foregoing updates to the Brown Act.

Background

The Ralph M. Brown Act (“Brown Act” or “Act”) (Gov. Code section 54950 et seq.), governs the public’s rights to attend and participate in meetings of local legislative bodies, and provides procedural requirements for such meetings. The Brown Act is updated from time to time by the State legislature, or Gubernatorial Orders. The Personnel Committee annually reviews the Ralph M. Brown Act for changes that may have an effect on how EBDA conducts its Committee and Commission meetings.

Discussion

As discussed in Item No. 9, modifications to Brown Act requirements have been made over the past several years to accommodate teleconferencing as a public health measure during the COVID-19 pandemic. The Brown Act requires that all meetings of a legislative body of a local agency be open and public and that all persons be permitted to attend and participate. The Act also allows for meetings to occur via teleconferencing subject to certain requirements, particularly that the legislative body notice each teleconference location of each member that will be participating in the public meeting, that each teleconference location be accessible to the public, that members of the public be allowed to address the legislative body at each teleconference location, that the legislative body post an agenda at each teleconference location, and that at least a quorum of the legislative body participate from locations within the boundaries of the local agency’s jurisdiction.

Executive Order N-29-20 (“Order N-29-20”), issued by the Governor on March 17, 2020, allowed local legislative or state bodies to hold public meetings via teleconference without having to provide a physical location from which members of the public may observe the meeting and offer public comment, provided members of the public are allowed to observe and address the meeting telephonically or otherwise electronically. Executive Order N-29-20 expired on September 30, 2021.

On September 16, 2021, Governor Newsom signed AB 361 (2021) which allows for local legislative bodies to continue to conduct meetings via teleconferencing without complying with certain Brown Act provisions under specified conditions and includes a requirement that the Commission make specified findings. AB 361 amended section 54953 of the Government Code and essentially codified portions of the Executive Orders issued by the Governor, which relaxed Brown Act teleconferencing restrictions. AB 361 (2021) took effect October 1, 2021 and is effective until January 1, 2024. Pursuant to AB 361, legislative bodies are allowed to continue to meet remotely during a declared State of Emergency if the legislative body finds that meeting in person would present imminent risks to the health or safety of attendees. Each month, beginning in October 2021, EBDA’s Commission has adopted a resolution authorizing the continued use of remote teleconference meetings pursuant to AB 361.

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On October 17, 2022, Governor Newsom announced that the COVID-19 State of Emergency will terminate on February 28, 2023. Notably, the County of Alameda aligned with the State's position and immediately terminated its COVID-19 emergency declaration on October 25, 2022. The advance announcement is intended to provide state and local agencies the time needed to prepare to respond to legislation affected by the termination. This includes the termination of the remote meeting rules enacted by AB 361. While the provisions of AB 361 technically remain law through the end of 2023, those provisions require an active state of emergency for their operation. As a result, EBDA will no longer be able to rely on AB 361 after February 28, 2023.

Beginning January 1, 2023, new rules established by AB 2449 allow for remote proceedings even without a state of emergency. However, AB 2449 is intended to allow individual members the opportunity to participate in meetings via teleconference in limited circumstances. Thus, even though the State of Emergency does not expire until the end of February 2023, EBDA will no longer be able to conduct remote meetings after January 1, 2023 unless the conditions under AB 2449 are met.

AB 2449, signed by Governor Newsom in September 2022, allows local legislative bodies to hold teleconferenced meetings without complying with the traditional Brown Act rules. To do so, however, at least a quorum of the members of the legislative body must participate in person from a singular physical location identified on the agenda, which location will be open to the public and within the boundaries of the local agency. The legislative body must also provide either a two-way audiovisual platform or two-way telephonic service and a live webcasting of the meeting to allow the public to remotely hear and visually observe the meeting, and remotely address the legislative body. The agenda must identify and include an opportunity for all persons to attend via a call-in option, internet-based service option, and at the in-person location of the meeting. Additionally, AB 2449's teleconference procedures are limited to a period of no more than three consecutive months or 20% of the regular meetings within a calendar year, or more than two meetings if the legislative body meets fewer than ten times per calendar year.

The individual members of the legislative body are allowed to participate remotely only if either "just cause" or "emergency circumstances" exist as defined by AB 2449. "Just cause" is defined as either: (i) a childcare or caregiving need of a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner that requires them to participate remotely; (ii) a contagious illness that prevents a member from attending in person; (iii) a need related to a physical or mental disability as defined by statute; or (iv) travel while on official business of the legislative body or another state or local agency. "Emergency circumstances" means a physical or family medical emergency that prevents a member from attending in person.

AB 2449's rules will remain in effect through 2025. In the absence of any future legislation, the traditional Brown Act teleconference rules will return in full effect on January 1, 2026.

In September 2022, Governor Newsom also signed AB 2647 into law, which provides EBDA with authority to make agenda items available via its website. A copy of all agenda items must still be made available to the public in compliance with the Brown Act. Since

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EBDA already makes its agenda timely available on the website and office, this new law has no affect as a practical matter.

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ITEM NO. P5 REVIEW OF COMMISSIONER COMPENSATION POLICY AND SET RATE FOR 2023

Recommendation

Provide direction to staff.

Background

Per the Sanitary District Act of 1923, Commissioners may receive compensation for each day of service in an amount adopted by the Commission. In December 2020, the Commission adopted the Authority's Commissioner Compensation Policy, which is attached for reference.

In November 2018, the Commission adopted a rate of \$240 per day of service, which has been in effect since January 1, 2019. This compensation rate may be adjusted by up to 5% annually by action of the Commission. Commissioners are currently considered contractors by EBDA and therefore receive 1099 tax forms documenting annual compensation, rather than W-2s.

Discussion

Staff is seeking feedback from the Committee on whether the compensation rate of \$240 per day should be adjusted. Staff is also recommending that beginning January 1, 2023, Commissioners be classified as Authority employees rather than contractors.

Compensation Rate

Staff is seeking input from the Committee on whether the daily Commissioner compensation rate should be adjusted, and/or whether any other changes to the Policy are warranted. The current rate may be increased up to \$252 per day of service. The table below, recently produced by Oro Loma, includes current rates for EBDA's sanitary district members and other local agencies. Note that EBDA's current Policy allows for compensation for up to six meetings per month.

Agency Name	Board Compensation per Meeting	Total District Meetings per Month	Maximum Paid Meetings per Month
West County Wastewater District	\$265.35	4	6
Oro Loma Sanitary District	\$260.00	8	6
EBDA	\$240.00	4	6
Castro Valley Sanitary District	\$230.00	3	6
Union Sanitary District	\$212.10	4	6
Dublin San Ramon Services District	\$195.00	2	10
Central Contra Costa Sanitary District	\$185.00	6	6
Delta Diablo Sanitation District	\$170.00	1	6
Fairfield Suisun Sewer District	\$152.77	2	6

Classification

As noted above, Commissioners are currently classified by the Authority as independent contractors or workers, and therefore receive 1099 tax documentation. Staff is recommending that Commissioners be reclassified as employees receiving W-2s. If

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supported by the Committee and Commission, this change would take effect January 1, 2023.

Basis for Classifying Commissioners as Employees

Per the Internal Revenue Service ([IRS](#)), the following facts indicate that an office is a “public office”:

1. The constitution, legislation, or a municipality or other body with authority conferred by the legislature created the office
2. The office was delegated a portion of the powers of a government body
3. Legislative authority or law defined, either directly or indirectly, the powers conferred and the duties to be discharged by the office

This definition, along with EBDA’s Amended and Restated Joint Exercise of Powers Agreement, points to Commissioners being classified as statutory employees. As such, staff and legal counsel believe that the IRS would classify the Commissioners as employees for income and payroll tax withholding purposes (i.e., their income should be reported on a W-2 with income and payroll taxes withheld accordingly).

Further, legal counsel suggests the IRS would treat the EBDA Commissioners as employees because of their status as “public officials.” Internal Revenue Code (IRC) § 3401(c) provides that, for income tax withholding purposes, the term “employee” includes an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing. Thus, by federal statute, public officers are specifically included within the term “employee” for income tax withholding purposes (and conversely are not “independent contractors” for income tax withholding purposes). Section 31.3401(c)-1(a) of the Employment Tax Regulations clarifies that officers or employees can either be elected or appointed.

Regulations for IRC §1402, addressing the applicability of self-employment tax, indicate that the performance of the functions of a public office does not constitute a trade or business. Therefore, holders of “public office” are not subject to self-employment tax. Generally, all holders of public office that receive payment for their services are excepted from self-employment tax and are presumed to be employees receiving wages.

Implications of Reclassification

As employees, the Authority may be required to provide some form of retirement plan for Commissioners if Social Security taxes are not withheld. EBDA does not currently have a Section 218 Agreement and does not currently withhold Social Security taxes from employee wages. As elected officials, Commissioners are generally not eligible for CalPERS pension benefits. Government Code § 20322 states an "elective officer" is excluded from membership in CalPERS unless they file request in writing with the CalPERS Board of Administration to become a member. Staff is currently evaluating three options: withhold Social Security taxes for Commissioners, require that Commissioners request to join CalPERS, or provide an alternate retirement benefit such as deferred

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compensation. Staff will provide a recommendation on this issue at a future meeting.

EBDA does not pay or withhold taxes for Unemployment Insurance (the Authority pays the state if an employee submits a claim) or State Disability Insurance (private 3rd-party short term disability insurance is offered to employees through Hayward). Applicable withholdings if Commissioners are reclassified as employees would therefore be federal and state taxes and Medicare. The current rate for Medicare payroll tax is 2.9%, split 50/50 by the employee and employer. Using the October Commissioner Compensation of \$2,640, the estimated Medicare payroll tax paid by the Authority would be \$38.00 per month, with an annual impact less than \$500.

Other financial impacts to EBDA would be costs for payroll and Worker's Compensation insurance, if deemed applicable. Staff estimates the annual additional payroll cost to be approximately \$200. The cost for providing Worker's Comp for Commissioners is estimated to be \$1600 or less.

As employees, Commissioners could be eligible for other benefits, such as healthcare. However, where eligible, Commissioners are already receiving healthcare benefits through the primary agency they were elected to serve. Therefore, staff recommends clarifying in the Commissioner Compensation Policy and/or Personnel Policy that Commissioners are not eligible for EBDA healthcare benefits.

POLICY NUMBER: 5

NAME OF POLICY: Commissioner Compensation

LAST REVISED: December 17, 2020

PREVIOUSLY REVISED: NA

PURPOSE: The purpose of this Policy is to prescribe the manner in which Authority Commissioners may be compensated and/or reimbursed for actual and necessary expenses related to official business of the Authority as well as for attendance at professional, educational, or vocational meetings.

POLICY: It is the policy of the Authority to provide fair and appropriate compensation for Commissioners performing their official duties.

Per the Sanitary District Act of 1923, Health and Safety Code sections 6400 et seq. Health and Safety Code section 6489(a) provides that board members may receive compensation not to exceed one hundred dollars (\$100) "for each day's attendance at meetings of the board or for each day's service rendered as a director by request of the board, not exceeding a total of six days in any calendar month, together with any expenses incident thereto." Health and Safety Code section 6489(b) provides that the board may adopt by ordinance an increased amount of compensation received by board members above the amount of one hundred dollars (\$100) per day.

On this basis, Commissioners shall be paid per day, not per meeting. Effective January 1, 2019, the current daily compensation rate is \$240 for each day of service (Resolution 18-40). This compensation rate may be adjusted by up to 5% annually by action of the Commission. The Authority shall compensate Commissioners for up to six days of service per month.

The following activities shall be considered Commission service eligible for compensation:

- Attendance at Authority Commission Meetings, Committee Meetings, or other Commission workshops or meetings subject to the Brown Act
- Representing the Authority at meetings or events at the request of Authority staff or Commission

For the events above, Commissioners shall be entitled to the daily service stipend as well as reimbursement for associated travel costs.

For other activities, including conferences, meetings, and professional development, Commissioners shall be compensated by their home agencies. Commissioners may seek exceptions whereby the Authority provides compensation by requesting pre-approval by the Commission. The Commission may consider pre-approving compensation for these and any other activities on a case-by-case basis.

For additional clarity, under Government Code Section 61047, the following activities are ineligible for compensation and therefore the Commission cannot approve them as being eligible for compensation:

- Attendance at meeting of a Standing, Liaison, Ad Hoc, or Advisory Committee of the Board on which the Commissioner does not serve
- Attendance at any meeting solely with Authority staff other than a tour or special training two hours or longer
- Internal Authority events, including groundbreakings, ribbon cuttings, dedications, and anniversary celebrations
- Social gatherings such as retired Commissioner dinners and pre-conference activities and nonpartisan welcoming or retirement events for staff of local agencies and organizations
- Meetings with legislators other than at a public meeting conducted pursuant to the Brown Act
- Any activity for which a Commissioner receives compensation from another agency