INTRODUCTION

This response is submitted by the City Council of the City of Long Beach in reply to the draft audits conducted by the New York State Office of the Comptroller. City of Long Beach - Payments for Unused Leave Accruals 2019M-68 & Financial Condition 2019M-133.

In or about February 2019, the City Council ("Council") became aware that the law firm of Lewis Baach Kaufmann Middlemas, PLLC had been retained by the Acting City Manager of the City of Long Beach to represent the City in response to putative investigations by the District Attorney of Nassau County and the United States Attorney for the Eastern District of New York. The Council has been advised that the investigations had focused upon the payment of City funds for leave time accumulated by City employees who retired from the City, employees who left its employ, and employees who remained employed by the City of Long Beach. The Council learned that Lewis Baach Kaufmann Middlemas, PLLC, had been previously retained by the City Administration, without the participation of the Council. The Council was informed that Lewis Baach Kaufmann Middlemas, PLLC had submitted a response to the New York State Comptroller audit, on behalf of the City. However, the firm was retained without the Council's knowledge.

As noted above, the Council was uninvolved in the retention of Lewis Baach Kaufmann Middlemas, PLLC; the firm was hired more than a year ago, by former Acting City Manager Michael Tangney to represent the City in the referenced criminal investigations. The City's official response was drafted by Anthony Capozzolo, Esq., a partner in Lewis Baach Kaufmann Middlemas, PLLC, after former Acting Corporation Counsel and later Acting City Manager Robert Agostisi recused himself. It was reported in Newsday that Ira McCracken, the Comptroller Chief Examiner, stated the recusal was "presumably because he received payments, the validity of which are questioned by the report." John Asbury, State Urges Long Beach to File Official Response to Audit, NEWSDAY (Oct. 9, 2019), https://www.newsday.com/long-island/nassau/long-beach-audit-overpaid-1.37326012. The Council was not involved in the preparation of the Capozzolo response nor in the conclusions reached by that response.

Subsequent to the submission of Cappozolo's response, the Council raised objection to the New York State Comptroller's reliance on the Capozzolo response as the elected representatives of the City of Long Beach. On October 11, 2019, the Council voted to rescind the City's response to the draft state audit of separation payouts to current and prior City employees.

The New York State Comptroller's office responded to the Council's rescission of the Capozzolo response. The State Comptroller's office advised that a municipality can only speak through its elected and appointed officials and that the proffered response by Lewis Baach Kaufmann Middlemas, PLLC, a non-public official, cannot constitute an acceptable response by the municipality, the City of Long Beach. The Council was reminded by the Comptroller that under the City's charter, the Council has overall responsibility for the City's management, including appointing the City Manager, who serves at the pleasure of the Council.

The Council is composed of part-time elected citizens who are otherwise engaged in their own full-time livelihoods and full-time employment outside of City government. It is simply impossible for the Council to independently investigate the serious allegations raised in the New York State Comptroller's report without the assistance of independent counsel and perhaps, ultimately with the assistance of a forensic accounting firm.

Cognizant of the draft findings of the State Comptroller and the self-interested involvement of many exempt officials of the City Administration, during August 2019 three members of the Council of Long Beach sought to retain Ingerman Smith, LLP on behalf of the City and Council to conduct an independent investigation of the matters referred to in the audit reports. The Council sought to retain Ingerman Smith, LLP to investigate payments made to employees of the City for accumulated leave and overtime hours, to consider recovery of any improperly paid sums, and to determine if any liability attached to officers of the City for the extraordinarily large leave "cash-outs" that were permitted to occur. Subsequently, the President of the Council executed a retainer agreement with Ingerman Smith, LLP. The utilization of Ingerman Smith, LLP was intended to assist the Council in carrying out its duty of due diligence regarding the alleged improper payments, to prepare a response to the audits together with the development for a corrective action plan for submission to the New York State Comptroller.

Thereafter, on or about September 4, 2019, the former Acting City Manager, Robert Agostisi, asserted that the retainer agreement was invalid, claiming that only the City Manager could execute such an agreement pursuant to the City Charter, employing the services of outside counsel. (See City of Long Beach, N.Y., Charter art. 3, § 20 (1922)). Once the former Acting City Manager asserted that the retainer agreement was improperly executed by the President of the Council rather than by the Acting City Manager, the Council submitted the retainer agreement to the former Acting City Manager and Acting Corporation Counsel with the intention of holding a properly called Council meeting to consider and to vote on a resolution regarding appointment of Ingerman Smith, LLP as special counsel. However, the meeting never occurred nor did a vote on the proposed resolution occur because less than a majority of the Council

continued to support the retention of outside counsel to assist the Council in the aforedescribed matters.

Subsequent to the Council's withdrawal of support for the appointment of Ingerman Smith, LLP as special counsel, the former Acting City Manager, Robert Agostisi, resigned effective October 1, 2019. The Council thereafter appointed John Mirando as the new Acting City Manager. Shortly after Mirando's appointment, the Council informed the new Acting Corporation Counsel, Gregory Kalnitsky, Esq., of its wish to retain Ingerman Smith, LLP to represent the City of Long Beach in responding to the State Comptroller's audit reports. The retainer agreement was executed by Mirando, and sent to Ingerman Smith, LLP by the Acting Corporation Counsel late Thursday evening on November 7, 2019, just four calendar days before the due date of the City's response to the draft audit report which was due on the originally extended date of November 11, 2019. The retainer agreement provides the following: "It is understood that said response shall be submitted to the Council for its review and approval prior to submission to the New York State Comptroller."

Following its retention in the late afternoon of November 7, 2019, Ingerman Smith, LLP submitted a request the next morning to the State Comptroller requesting a thirty-five (35) day extension of time to prepare a response to the draft audit on behalf of the City. This further request for an extension was made in view of the necessary time for Ingerman Smith, LLP to undertake a due diligence review of the voluminous documents and to conduct necessary legal research. Understandably, in view of prior extensions it had granted, the State Comptroller's office was reluctant to continue the lengthy extension of time for the City to respond to the audits. The Comptroller authorized a brief extension of a little over one week to November 22, 2019 for the Council to reply.

Hence, this document can be characterized as the Council's preliminary response and statement of affirmative actions it intends to undertake in response to the draft Comptroller's comprehensive audits. There is simply insufficient time within approximately one week for the Council to complete an independent review of the serious allegations of improper payments to its exempt employees, as well as to its employees in the PBA and CSEA bargaining units. It is emphasized that the Council was not consulted nor did it participate in the preparation of the Capozzolo response. Further, the prior Acting City Manager refused in August to provide the Council with the professional assistance necessary to undertake a review of the findings of the State Comptroller and the necessary investigation that must follow the release of the final audit reports.

The Council reserves all of its rights to continue review of the Comptroller's findings, including, but not limited to, investigation and action concerning the substance of any employee malfeasance and consideration of recoupment of improper leave payouts

during and before the one year review by the Comptroller. The Council is certainly cognizant that while providing a rationale to defer attempts to recoup overpayments, the Lewis Baach Kaufmann Middlemas, PLLC report together with the Comptroller's audit indicate serious issues regarding very substantial overpayments of monies to employees of the City, including the occupants of the office of City Manager.

RESPONSE TO FINANCIAL CONDITION AUDIT 2019M-133

CITY COUNCIL OVERSIGHT RESPONSIBILITY

The Council of Long Beach recognizes that it has the overall responsibility for the City's operations and such responsibility includes oversight of the City's budgets and the City's financial condition. However, the Comptroller's criticism that the Council has not taken the appropriate steps to oversee the financial condition of the City has to be read in context with the City Charter and the Council's lack of authority to take appropriate measures in terms of oversight. The City Charter imbues all administrative authority in the City Administration – specifically in the hands of the unelected, and appointed City Manager. The Council's demand for information and professional assistance from the City Manager's office often has gone unanswered. For example, as mentioned previously in the introduction of this response to the Comptroller's audits, when the Council attempted to retain outside independent counsel to conduct an independent investigation of the matters referred to in the audit reports through execution of a retainer agreement by the Council President, such attempt was thwarted by the previous Acting City Manager.

Agostisi claimed that only the City Manager could execute such an agreement pursuant to the City Charter, employing the services of outside counsel. *See* City of Long Beach, N.Y., Charter Art. 3, § 20 (1922). Pursuant to Agostisi's interpretation of the City Charter, the Council was essentially stripped of the authority to hire independent counsel, or for that matter any independent organization to diligently investigate claims without the approval of the Acting City Manager including for example a forensic audit accounting firm. In other words the very same city administrative officers who are within the ambit of receiving substantial questionable payments for accumulated leave time hold the keys to independent investigation of the same payments. As a result of this apparent lopsided authority, we, the Council, will strongly consider the study of city charter reform to restore appropriate checks and balances to City government.

The Council's lack of authority also relates to the Council's failure to oversee the City Manager and require that he prepare multiyear financial plans or a fiscal improvement plan. However, as noted by the Comptroller, the Council did approve a resolution in April 2019 to retain a financial consulting firm to develop a multiyear fiscal improvement plan. Therefore, the Council is attempting to rectify the situation by

identifying the root causes of the City's fiscal condition through the retaining of the consulting firm.

FUND BALANCE

As for the City's general fund balance and its steady decline over the past few years, the Council is aware of the issue and will undertake remedial steps to properly fund the City's fund balance to the extent possible. Of course as is the case with municipal government the lion's share of cost is employee wages and benefits. Other than exempt employees, all other City employees are unionized and the Council is certainly aware of its statutory responsibility to negotiate wages, hours and working conditions with its unions before it can institute personnel cost reductions. However, as noted in the Comptroller's draft audit, part of the decline in the fund balance has to do with the related matter in the draft audit 2019M-68 regarding substantial overpayments for unused leave accruals. The Council has had to use the fund balance and borrow money in the form of bonds in order to pay for the exorbitant termination payouts. The Comptroller's report urges the Council to undertake "claw-back" efforts to recover these overpayments. Once the Council is able to secure the pertinent information necessary to support such an effort, it will undertake necessary steps to rectify the overpayments. Additionally, as noted in the response to Comptroller audit report 2019M-68, certain City officials may be personally liable for authorization of these improper payments.

FUTURE EFFORTS

All of the foregoing matters will be addressed in more detail in the corrective action plan following issuance of the Comptroller's final audit reports.

In closing, the Council readily admits that it must reinvigorate its oversight efforts, and will redouble its efforts to obtain the necessary independent professional support for the required investigatory steps precedent to effective oversight. It will seek the introduction and adoption of remedial legislation to ensure transparency of the City Administration's stewardship of the City's Fisc.

RESPONSE TO PAYMENTS FOR UNUSED LEAVE ACCRUALS 2019M-68

RELIANCE ON PAST PRACTICE IS MISGUIDED AND CONTRADICTORY TO EXPRESS COLLECTIVE BARGAINING AGREEMENT AND CITY CHARTER AND CODE LANGUAGE

It is highly questionable that "past practice" permitted the City to exceed the contractual limits of separation pay to CSEA employees, exempt employees, and police officers in contradiction of the Collective Bargaining Agreement between the Police Benevolent Association and the City of Long Beach.

The determination as to whether an employee or former employee is entitled to be paid for accrued time (e.g. unused sick leave, vacation time, personal leave, etc.) is governed by applicable statutes and/or the contract between the parties.[1] If any applicable statutes or employment contracts are silent with regard to payment of accrued and unused time upon separation from service, then an employee may be entitled to the monetary value of any unused accrued time if he/she establishes that, upon termination, the employer had a regular practice of paying its employees accumulated and unused time and that he/she relied upon such practice in accepting or continuing his/her employment.[2] Absent a contractual or statutory provision, for an employee to recover termination pay they must demonstrate: (1) a regular practice by the employer to provide the benefits being claimed; (2) the employee's knowledge of the practice; and (3) his or her reliance upon such practice as evidenced by accepting or continuing employment as a result thereof.[3]

(i) Sick Time Payouts to CSEA and Exempt Employees

The Draft Audit Report states that the City's Acting Comptroller and Corporation Counsel staff disclosed that as a result of a Council-approved retirement/separation incentive in 2012 provided to both CSEA and exempt employees, the City has "necessarily" interpreted the 30 percent sick leave entitlement in the City Code to mean that exempt employees shall be entitled to "*no less than 30 percent of the total number of sick days accrued, multiplied by the rate of pay at the time of separation*." This assertion is severely misguided and demonstrably false. At no point in time was there ever any indication that thirty percent was the floor and not the cap.

Here, the statutory and contractual language is clear and unambiguous. Exempt and CSEA employees are entitled to be paid for 30% of their accrued sick time upon separation without cause, retirement, or death. Section 19-19(B) [Sick leave entitlement] of the Personnel Code of the City's Charter ("Personnel Code") states, *inter alia:*

> *Upon termination of employment, exempt employees shall be entitled to payment in cash for the same number of accumulated sick days at the rate of* ***thirty (30)***

[1] *See* Linwood v. United Activities Unlimited, Inc., 43 Misc.3d 131(A) (2d Dept. 2014); Steinmetz v. Attentive Care, Inc., 39 Misc.3d 148(A) (2d Dept. 2013).
[2] Spencer v. Christ Church Day Care Ctr., 280 A.D.2d 817, 818 (3d Dept. 2001).
[3] Gallagher v. Ashland Oil, 183 A.D.2d 1033, 1034 (3d Dept. 1992).

> ***percent*** *of the total number of days accrued, multiplied by the rate of pay at the time of termination*.(Emphasis added)[4].

Further, Section 19-20 [Compensation in lieu of vacation, sick leave, and personal days upon termination of employment] of the Personnel Code states:

> *Any exempt employees whose services are terminated for any reason other than cause, shall be entitled to cash payment of the monetary value of his/her accumulated and unused vacation time, sick leave, and personal days,* ***up to the limits as set forth in this article***. (Emphasis added).

Section 8-2.4 [Sick Leave Distribution] of the CSEA Collective Bargaining Agreement ("CBA") (effective July 1, 2018 through June 30, 2025) provides:

> *Upon death, retirement under the New York State Employees Retirement System, or honorable separation from the City, an employee shall be entitled to receive pay for* ***thirty (30) percent of his/her unused sick leave.*** *This payment is to be made with no maximum accumulation of days*. (Emphasis added).

While there is no cap on how many sick days an employee can accrue and accumulate throughout their employment, it is clear from these cited provisions that upon retirement or honorable separation an employee is entitled to receive pay for thirty percent of their unused sick leave.

Even assuming, *arguendo*, the statutory and contractual language was in some way ambiguous, which it is not, it is unlikely that an employee would ever be able to establish that there was a past practice in place. As referenced above, an employee would first need to demonstrate that the employer had a regular practice of providing the benefits being claimed. It is clear from the language of the Code and CSEA CBA that the standard allowable percentage was thirty percent. This has been the express language of the Code since at least 1997 and the CSEA CBA since at least 2003.

In February 2012, a former City Manager requested a resolution from the Council authorizing the City to Establish an Early Retirement/Separation Incentive which exceeded the 30% limit. Thereafter, on February 21, 2012 the Council voted to approve this Resolution allowing the City to offer a limited time retirement incentive of the payment of 50% of sick time to CSEA and Exempt employees ("*The City of Long Beach shall afford all full time CSEA and exempt employees the opportunity to participate in an Early Retirement/Separation Incentive Program, to be compensated at a rate of fifty (50%) of his/her unused sick time, who leave service with the City within ninety (90) days of passage of this resolution…*").

[4] See also General Municipal Law 92.

This deviation can hardly be considered to have established a past practice. First, the incentive was limited to retirements and/or separations occurring within ninety days of February 21, 2012. Second, the City Manager's own letter conveying this offer to employees states explicitly, "*You will receive the payout of 50% of your accumulated sick time as opposed to the normal 30%* ***as per the contract***" "*Please keep in mind that this incentive is* ***only available for a limited period of time.*** *It will be available for the next 45 days,* ***with no future incentives on the horizon.***"(***Emphasis added***). Third, to date, the Council has not approved any other deviation from the 30% limit in the CBA or Code. While the Draft Audit Report reflects that there may have been other deviations of these provisions providing for payout more than the 30% limit, these instances were the exception to the predominantly regular standard of thirty percent and were beyond the scope of the February 2012 Council-approved deviation. Finally, Section 11-1.3 [Past Practices] of the CSEA Contract states:

> *The parties will, within ninety (90) days from execution hereof list practices. Any claims practices not agreed upon shall be subject to the grievance and arbitration procedures as to the question of whether the claimed practices are, in fact, practices.*

Importantly, upon information and belief, neither party submitted a claim pursuant to this provision, that there was a past practice of employee's receiving cash payment of more than 30% of his/her unused sick leave. The City cannot now claim that a past practice exists after (1) it negotiated and executed the CSEA CBA which contains an express provision for 30% payout of sick leave accruals, and (2) upon information and belief, neither party submitted a claim that a past practice exists allowing a higher payout.

Therefore, for all the aforementioned reasons, there is no evidence to support the City's contention that a past practice exists with respect to accrued sick time payouts in direct contravention of the express language of the Code and CSEA CBA.

(ii) Patrolmen's Benevolent Association ("PBA") Separation Payments

The Draft Audit Report further states that City Police Department officials disclosed that "*it has always been their practice to pay PBA employees for the accumulated vacation and compensatory time at separation*." The Council was informed that a past practice exists with regard to exceeding certain contractual caps for separation payments for police officers and that the police union affirmed that exceeding contractual caps on vacation has been ongoing for years.

These assertions are expressly contradicted by the plain language of the 2003-2008 PBA CBA and the Interest Arbitration Award from Arthur Riegel, Esq. dated May 29, 2015.

Section 15(c) [Vacation] of the 2003-2008 PBA CBA states in relevant part:

An employee shall be entitled, at the employee's own option, to accrue up to fifty (50) days of vacation from year-to-year and be paid for that sum at retirement.

The Arbitration Award shows no indication that the PBA presented any testimony regarding changing this section of the CBA. In fact, the PBA proposed to change two other subsections within Section 15 [Vacation] of the CBA but notably not Section 15(c). The PBA's silence regarding this provision is illustrative. There is no evidence that the PBA claimed that a past practice existed whereby the amount of vacation days payable upon retirement was paid in full. Surely if such a practice existed the PBA would be the first party to mention this to the Arbitrator as a method by which to achieve an award in their favor. The arbitrator himself, on page 42 of the award, states that "*[u]nder current contract language, police officers can receive 400 hours of vacation leave payout*."

Therefore, as a result of the foregoing, the asserted past practice cannot exist because both parties make no mention of any such past practice and instead focus on the express language of the contract. If the police officers believed they were entitled to termination payouts which exceed the contractual caps they would most certainly have submitted such a proposal. Additionally, the termination payouts available to police officers pursuant to contract language were reaffirmed by the arbitrator in his decision and statement of the facts.

TO THE EXTENT THAT PAST PRACTICE WAS INCONSISTENT WITH THE EXPRESS LANGUAGE OF THE COLLECTIVE BARGAINING AGREEMENTS, THE CITY HAD THE AUTHORITY TO REVERT TO THE EXPRESS LANGUAGE OF THE COLLECTIVE BARGAINING AGREEMENT

Even if the asserted past practice exists, the City Administration could have chosen at any time to revert to the clear and express terms of a collective bargaining agreement.[5]

The right for an Employer to revert to the terms of a Collective Bargaining Agreement is well-established. An employer is privileged to revert to the terms of its collective bargaining agreement notwithstanding an inconsistent past practice. Having reached an agreement on a subject matter, that agreement, not any practice with respect thereto, fixed and controlled the terms and conditions of employment. In County of Onondaga, 26 PERB ¶ 4645 (1993), the Public Employment Relations Board (hereinafter "PERB" or "Board") held:

[T]hat an employer is privileged to revert to the terms of a fixed and specific contract right, notwithstanding any inconsistent practice, because the contract, not the practice, fixes and controls the terms and conditions of employment. Thus, action taken in conformity with the

[5] There was never a contract nor Personnel Code restriction barring the City Administration from ending the alleged "past practice" that exceeded the Personnel Code of the City.

contract is not unilateral. This privilege of reversion is applicable whether the contract is in effect or has expired.

An employer's obligation is to refrain from unilaterally changing a term and condition of employment, not a practice. In Maine-Endwell Central School District, 14 PERB ¶ 4625 (1981), aff'd 15 PERB ¶ 3025 (1982), the Board ruled:

Where [the] contract is silent on a particular item, the past practice of the parties may be examined to determine the term and condition. But when the parties have negotiated and reached an agreement on the item, the contract then defines the term and condition of employment, and actions taken pursuant thereto can no longer be labeled as unilateral. In essence, the parties have, for the duration of the contract, waived their right to complain about such actions.

Maine-Endwell Central Sch. Dist., 14 PERB ¶ 4625 (1981). In deciding Florida Union Free School District, 31 PERB ¶ 3056 (1998), the Board utilized the standard adopted in Maine-Endwell Central School District. In Florida Union Free School District, the Board dismissed an improper practice that was premised on an alleged breach of the duty to bargain with respect to coffee breaks. 31 PERB ¶ 3056 (1998). The Board determined that since the parties' contract provided that the workday of employees would be 7 ½ hours per day, exclusive of a half hour lunch period, the district was privileged to revert to the terms of agreement and eliminate a long-standing practice of allowing extra-contractual coffee breaks. In Florida Union Free School District, the Board ruled that even when the parties' contract is silent as to a specific term and condition of employment, where the parties have fully negotiated and reached an agreement on a mandatory subject of negotiations which encompasses the specific term and condition at issue, the employer cannot be said to have acted unilaterally when it reverts to the terms of the negotiated agreement. Id. Likewise, in the Matter of State of New York (Workers' Compensation Board), the Board held that a contract, which comprehensively addressed paid leave, permitted an employer to unilaterally discontinue a practice of allowing employees to take a twenty-minute break to cash their checks on payday. 32 PERB ¶ 3076 (1999).

The Board has held that a contract reversion defense is also appropriately characterized as a duty satisfaction defense. In County of Nassau, 31 PERB ¶ 3074 (1998), PERB stated:

An employer raising a contract reversion defense is claiming that it and the representative of its employees have already bargained and reached agreement on a subject. Having done so, the employer is privileged to act pursuant to the negotiated agreement, notwithstanding a practice to the contrary. The same argument forms the essence of a duty satisfaction defense. An employer, having bargained and reached an agreement with an employee organization as to how a subject is to be treated, cannot be held to have acted unilaterally in violation of the Act when it takes action allowed by the agreement. Its duty to negotiate has been satisfied. Whether the defense is

articulated as waiver by agreement or contract reversion, they are both differently phrased principals of duty satisfaction.

Similarly in Town of Shawangunk, 32 PERB ¶ 4503 (1999), an Administrative Law Judge declined to find a violation of the Act and upheld the employer's defense of duty satisfaction where the town announced that it would no longer adhere to the practice of affording 100% employer-funded health insurance for retirees. The collective bargaining agreement at issue in Town of Shawangunk addressed health insurance for active employees, but was silent with respect to the provision of health insurance benefits to retirees. PERB found that since the parties had fully negotiated and reached agreement on the subject of health insurance, the actions taken by the town could not be labeled unilateral. PERB ruled that the town's insistence upon strict adherence to the current collective bargaining agreement cannot be considered a unilateral change, actionable under the Act. Id.

In sum, the Board has held that "[d]uty satisfaction 'may be established by contractual terms that either expressly or implicitly demonstrate that the parties had reached accord on that specific subject.'" Matter of Police Benevolent Association of New York State, 50 PERB ¶ 3001 (2017), citing Orchard Park Cent. Sch. Dist., 47 PERB 3029, at 3089 (2014). When determining whether a contract reversion or duty satisfaction defense has been established, the Board must "interpret the meaning of the agreement through the application of standard principles of contract interpretation." Matter of Shelter Island Faculty Assoc., 45 PERB ¶ 3032 (2012). If the contractual language is reasonably clear on the specific subject at issue "but susceptible to more than one interpretation, [the Board] will consider extrinsic evidence, [such as negotiation history and/or a past practice,] in determining the intent of the parties." Id. In contrast, duty satisfaction is proven where a contract provision(s) establishes that the parties have comprehensively negotiated a subject. Matter of Sullivan Cnty. Patrolmen's Benevolent Assoc., 51 PERB ¶ 3008 (2018); see Springs Union Free Sch. Dist., 45 PERB ¶ 3040 (2012) (finding contract reversion based on two contractual provisions that set forth workday schedules, breaks, and leave time/excused absences, which extinguished an established past practice that was ongoing for at least five years which did not charge employees' leave balances if they chose not to attend an annual staff luncheon and as a result were released early). Once duty satisfaction is established, an employer may unilaterally end an inconsistent past practice without violating the Act by reverting to the specific terms of a negotiated provision in an agreement. Matter of Civ. Serv. Employees Assoc., Inc., Local 1000, AFSCME, AFL-CIO, 45 PERB ¶ 4566 (2012).

Based upon the foregoing the practice, if it was legally extant in Long Beach, could have been extinguished by the City Administration at any time following its alleged commencement in 2012. This unused authority is based upon the Taylor Law Doctrine of reversion.

Based on the foregoing provisions in the PBA CBA, CSEA CBA, and the City Charter, the subject of separation leave payouts for accumulated leave (i.e., sick leave, vacation leave, personal leave, and compensatory time) has been comprehensively negotiated by the parties. In other words, the provisions contained within the City Charter and applicable collective bargaining agreements are clear and express with regard to separation payouts and therefore the City has the privilege of unilaterally reverting to the contractual language. Without conceding that the alleged past practice has any legal viability, the Council indicates that it will immediately consider the passage of a resolution prophylactically invoking its right to revert to the express "cap" provisions of the PBA and CSEA contracts. This act will extinguish any past practice, if the same legally exists. The respective unions and employees may challenge such decision but the City of Long Beach would likely be able to successfully assert the defense of contract reversion and duty satisfaction. Further, the Council will consider a resolution affirming the legal insufficiency of the alleged past practice as it applies to exempt employees.

THE CITY ADMINISTRATION HAS A CONFLICT OF INTEREST IN THIS MATTER AS THEY POTENTIALLY DERIVE A BENEFIT FROM THIS PRACTICE

The failure of the City Administration to extinguish the subject past practice worked significant hardship on the City of Long Beach's treasury. The forbearance of the City Administration and its failure to simply invoke the well-known Taylor Law doctrine of reversion is troubling. Likewise, the erroneous claim of the existence of the claimed past practice is equally troubling. The Council will have to undertake careful examination of the propriety of these decisions in the crucible of the law of "conflicts of interest".

In the matter at hand, nearly all exempt employees would financially benefit at some time by adherence to the alleged "past practice". This apparent conflict of interest or at least appearance of impropriety raises the question whether the argument asserting the existence of a suspect past practice taken together with the failure to extinguish such a claim was motivated by personal interest. Of course, the forgoing concern relates directly to the Comptroller's exhortation that the City seek restitution of improperly paid funds.

THE EMPLOYEES INVOLVED IN THE PAYMENT OF THESE OVERPAYMENTS MAY BE PERSONALLY LIABLE FOR THEIR ACTIONS

Section 102-a [Administration of budget] of the City Charter states in pertinent part:

> *Payments and obligations prohibited. No payment shall be made or obligation incurred against any allotment or appropriation except in accordance with appropriations duly made and unless the city auditor first certifies that there is a sufficient unencumbered balance in such allotment or appropriation and that*

> *sufficient funds therefrom are or will be available to cover the claim or meet the obligation when it becomes due and payable.* ***Any authorization of payment or incurring of obligation in violation of the provisions of this Charter shall be void and any payment so made illegal. "Payments made" and "obligations incurred" shall include all promotions, salary increases, salary grade changes and the filling of positions and collective bargaining agreements. Such action shall be cause for removal of any officer or employee who knowingly authorized or made such payment or incurred such obligation, and such officer or employee shall also be personally and individually liable to the city for any amount so paid.*** *(*Emphasis added*).*

If it is determined that the City Administration authorized payments and incurred obligations in violation of the provisions of the Charter and that any such payments and/or obligations were void and illegal, pursuant to Section 102-a of the City Charter, the Council believes an independent investigation of the propriety of the decisions of certain City Managers and Acting City Managers, and whether they should be held personally and individually liable to the City for any amounts paid is warranted.

In addition to a claim under the City Charter, under New York law, an agent is obligated "*to be loyal to his employer and is 'prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties*.'"[6] If an employee owes a duty of fidelity to their employer and is faithless in the performance of his services then the employee "*is generally disentitled to recover his compensation, whether commissions or salary*."[7] It does not "*make any difference that the services were beneficial to the principal, or that the principal suffered no provable damage as a result of the breach of fidelity by the agent*."[8] A principal is entitled to clawback any compensation paid to the employee during the period of disloyalty.[9]

FURTHER QUESTIONS/COMMENTS POSED TO THE OFFICE OF THE COMPTROLLER

In anticipation of the final report, the Council presents to the Comptroller the following questions/comments:

1. The draft audit report is only for a single year: July 1, 2017 through June 30, 2018. During the Council's limited investigation, it is apparent that the City Administration's practice of overpayment of separation leave has been occurring since 2012. The

[6] Western Elec. Co. v. Brenner, 41 N.Y.2d 291, 295 (1977) (quoting Lamdin v. Broadway Surface Adver. Corp., 272 N.Y. 133, 138 (1936)).
[7] Feiger v. Iral Jewelry, Ltd., 41 N.Y.2d 928, 928 (1977) (citing Restatement (Second) of Agency (1958), § 469).
[8] *Id*. at 928-29.
[9] Maritime Fish Prods., Inc. v. World–Wide Fish Prods., Inc., 100 A.D.2d 81 (1st Dep't 1984) (employer is entitled to the return of compensation paid employee during period of disloyalty).

Council reserves all rights to expand an inquiry into the legality of all leave payments made from 2012 to 2018.

2. A former Acting City Manager received a separation leave payout during the time period of this audit. However, his payment is not listed amongst the payment reviewed by the Audit (See Figure 1, page 6). Is this payment not included in the tabulations considered in your audit?

3. In the Council's investigation, there has been concern with the payment to the former Secretary to Labor Relations with regard to his part time and full time employment. In both positions he had vastly different compensation levels; however, in Figure 1, page 6 it only considers his full time position salary. Is this agreement by the Comptroller that there is no controversy with respect to his employment and compensation?

4. At the bottom of page 6 and the carryover to page 7, the report states that the "Acting City Comptroller" and "Corporation Counsel Staff" made certain statements about paying employees leave balances greater than provided for under the City Code and that they were unable to produce any details about approvals of such policies, when they went into effect or why they would supersede the City Code; however, the draft audit states that City officials "verified that the City had followed these practices prior to our audit period." Upon information and belief, there was no uniform or consistent overpayment practice. The Council asks that in the Final Audit, the Comptroller indicate the specifics of the above assertion.

CONCLUSION

The Council intends to continue its investigation into the overpayment of terminal leave to exempt, CSEA and PBA employees and will evaluate whether to seek recoupment of the payments that were made in direct contradiction to the respective Collective Bargaining Agreements, City Charter, and City Personnel Code.

While Capozzolo attempted to provide support as to why the City acted properly, citing past practice, it appears clear from the City Charter, City Personnel Code, Collective Bargaining Agreements, and legal precedent that this practice should not have been continued and payouts should have been made strictly in accordance with the Collective Bargaining Agreements, City Personnel Code, and City Charter.

The Council looks forward to the final audit report, and will draft a corrective action plan in response which will prevent improper payments from occurring in the future. Notwithstanding the foregoing, the Council will still continue to investigate these overpayments of separation leave and determine the proper course of action.