

# City of Long Beach

## Financial Condition

---

DECEMBER 2019

---



OFFICE OF THE NEW YORK STATE COMPTROLLER  
Thomas P. DiNapoli, State Comptroller

# Contents

---

- Report Highlights . . . . . 1**
  
- Financial Condition . . . . . 2**
  - How Does a Council Adequately Manage Financial Condition? . . . . . 2
  - City Officials Did Not Properly Manage Fund Balance. . . . . 3
  - Adopted Budgets Were Not Structurally Balanced . . . . . 5
  - City Officials Did Not Adequately Monitor the Budget . . . . . 6
  - Interfund Advances Were Not Repaid . . . . . 7
  - The City Manager Did Not Prepare Multiyear Financial Plans. . . . . 8
  - What Do We Recommend? . . . . . 9
  
- Appendix A – Response From City Officials . . . . . 10**
  
- Appendix B – OSC Comments to the City’s Response . . . . . 25**
  
- Appendix C – Audit Methodology and Standards . . . . . 26**
  
- Appendix D – Resources and Services. . . . . 27**

# Report Highlights

## City of Long Beach

### Audit Objective

Determine whether the Council and City officials adequately managed the City's financial condition.

### Key Findings

- The City's total general fund balance decreased 68 percent from \$9.9 million at July 1, 2014 to \$3.2 million as of June 30, 2018, leaving an unassigned general fund deficit of \$813,994 at June 30, 2018.<sup>1</sup>
- The Council issued \$8 million of bonds from 2014-15 through 2016-17 and used another \$2.1 million of fund balance in 2017-18 to finance recurring expenditures, increasing the general fund debt service costs to 12.27 percent of the 2017-18 revenues.
- The City Manager has not prepared a multiyear financial plan including a fiscal improvement plan, in accordance with Local Finance Law Section 10.10(e).

### Key Recommendations

- Adopt structurally balanced budgets that contain realistic estimates of revenues and finance recurring expenditures with recurring operating revenues, instead of debt.
- Prepare a multiyear financial plan including a fiscal improvement plan.

We conducted two separate audits of the City, one on financial condition and the other on leave accrual payments. The City submitted a response letter that addresses the findings in both reports.

City officials had some concerns about our findings. Appendix B includes our comments to both reports regarding City officials' concerns.

### Background

The City of Long Beach (City) is located in Nassau County and has a population of approximately 34,000. The City is governed by its charter, City Code and New York State laws. The five-member City Council (Council) has overall responsibility for the City's operations, with the City Manager and other administrative staff having responsibility for overseeing and managing the City's daily operations.

#### Quick Facts

<b>2018-19 General Fund Appropriations</b>	\$82.4 million
<b>2017-18 Year-End General Fund Balance</b>	\$3.2 million
<b>2017-18 Year-End Unassigned General Fund Deficit</b>	(\$813,994)

### Audit Period

July 1, 2014 – June 30, 2018

<sup>1</sup> As per the City's audited financial statements

# Financial Condition

---

## How Does a Council Adequately Manage Financial Condition?

To effectively manage financial condition, the council must adopt realistic and structurally balanced budgets based on historical or known trends, in which sufficient recurring revenues finance recurring expenditures. The council is responsible for reviewing estimates of what the city will spend and the amounts it will receive in revenue (e.g., departmental income and State and federal aid), how much fund balance will be available at fiscal year-end and determining what the tax levy will be. Accurate budget estimates help ensure that the real property tax levy is sufficient to meet the city's needs, but not greater than necessary. Once the budget is adopted, the council, as well as the City Manager, should monitor actual results in comparison to the budget. If actual results are not in accordance with the budget, it is important for the council to take prompt action to adjust the budget and monitor operations to stay within the adjusted budget.

A key measure of a city's financial condition is its level of fund balance, which, in general terms, is the difference between revenues and expenditures accumulated over time. It is important for the council to adopt a policy that addresses the level of fund balance to be maintained in each fund and to use the policy in the annual budgeting process to help ensure that fund balance levels are adequate.<sup>2</sup> The council should consider the accumulation of fund balance for future needs, such as unanticipated expenditures and/or revenue shortfalls. When fund balance is appropriated, the expectation is that there will be an operating deficit (expenditures exceeding revenues) financed by the appropriated fund balance. A continuous decline in unassigned fund balance indicates a deteriorating financial condition and limits the city's ability to absorb unexpected financial events. Likewise, when recurring expenditures, such as separation payments, are paid for with debt, financial condition deteriorates. Once the budget has been adopted, the council should monitor the budget by reviewing budget-to-actual reports during the course of the year. The council should inquire about revenues and expenditures not meeting budgeted expectations and make any necessary budgetary amendments before financial condition is negatively affected.

New York State General Municipal Law (GML)<sup>3</sup> allows for moneys held in one fund to be temporarily advanced to another with certain restrictions. Such interfund advances can be used when available cash is not sufficient to pay current obligations. However, money must be repaid to the fund from which it was advanced no later than the close of the fiscal year in which the advances were made. Additionally, New York State Local Finance Law<sup>4</sup> authorizes the city to

---

<sup>2</sup> When determining the level of fund balance to maintain, the council should consider factors such as the timing of receipts and disbursements, the volatility of revenues and expenditures, contingency appropriations and any reserve funds established for various purposes.

<sup>3</sup> New York State General Municipal Law (GML) Section 9-a

<sup>4</sup> New York State Local Finance Law Section 11(a)(85-e)

---

issue debt to finance payments to employees for separation salaries. However, this type of debt should not be routinely relied upon to finance city operations. When the budget does not provide for such recurring expenditures and debt is issued, it results in the need not only to increase the budget to pay the next year's operating costs but also the increased debt service expenditures.

Multiyear financial planning is a tool cities can use to improve the budget development process. It enables city officials to identify revenue and expenditure trends, establish long-term priorities and goals, consider the impact of near-term budgeting decisions on future fiscal years and assess the merits of alternative approaches (such as using unassigned fund balance or establishing and using reserves) to finance operations. These projections can help policy makers assess expenditure commitments, revenue trends, financial risks and the affordability of new services and capital investments. For example, a multiyear plan would have helped the Council see the detrimental impact of using debt to finance recurring expenditures rather than adopting a structurally balanced budget.

Multiyear financial planning can also help city officials project the future costs of employee salaries and benefits provided for in collective bargaining agreements and City Code. Any long-term financial plan should be continually monitored and updated to provide a reliable framework for preparing budgets and ensure that information used to guide decisions is current and accurate. The multiyear financial plan must be prepared by the City Manager, and it should be communicated to the Council and taxpayers. If the multiyear financial plan reveals a projected budget imbalance between revenues and expenditures, the City Manager should establish a written fiscal improvement plan that identifies goals and actions to improve long-term fiscal stability.

### **City Officials Did Not Properly Manage Fund Balance**

City officials need to improve budgeting practices to effectively manage the City's financial condition. The City's adopted budgets and financial monitoring resulted in annual operating deficits in the general fund that totaled \$8.5 million over the last four fiscal years (an average of \$2.1 million per year). As a result, total general fund balance decreased 68 percent from \$9.9 million at July 1, 2014 to \$3.2 million<sup>5</sup> as of June 30, 2018 (Figure 1).<sup>6</sup> Approximately \$4 million of this fund balance was either restricted for specific purposes or in nonspendable form at the end of the 2017-18 fiscal year, leaving an unassigned fund deficit of \$813,994.

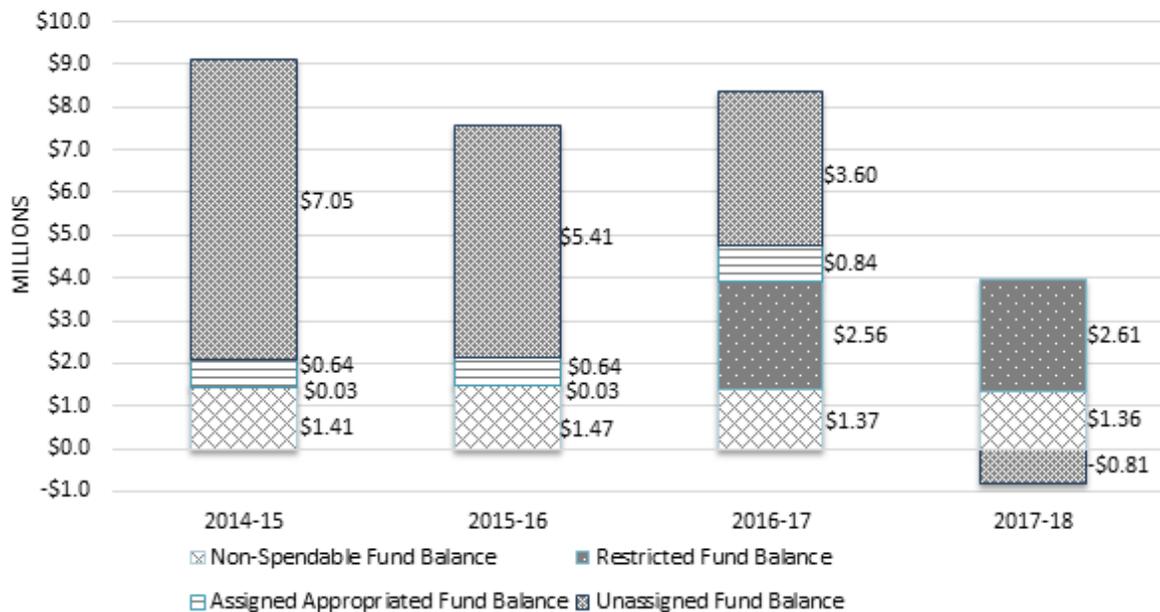
---

5 This amount includes \$1.7 million restricted for the length of service award program that the City moved from its agency fund to the general fund in 2016-17, in accordance with GASB 73.

6 As per the City's audited financial statements

**FIGURE 1**

**Total Year-End Fund Balance**



The City's fund balance policy<sup>7</sup> recommends that the City maintain an unassigned general fund balance in its general fund equal to 5 percent of the prior-year expenditures. In fiscal years where the unassigned fund balance falls below the recommended 5 percent, the policy requires City officials to develop a plan to replenish unassigned fund balance.<sup>8</sup> However, the current Council members are unaware of this policy. As of July 2019, preliminary operating results showed that the general fund ended 2018-19 with an \$800,000 operating deficit, increasing the total unassigned fund deficit to \$1.6 million. The City's 2019-20 budget includes a plan to recoup only \$150,000 of fund balance, with no formal plan for how officials will replenish the City's general fund balance or over what period, as required by the fund balance policy.

The rapid decline in fund balance resulted from poor budgeting practices by City officials, including unrealistic estimates of revenues, the use of non-recurring funding sources in the general fund and the lack of long-term financial planning.

7 Adopted by the Council in July 2013

8 The policy requires City officials to replenish unassigned fund balance by direct appropriation over a four year period, if possible, or create a revised strategy and time frame for replenishing unassigned fund balance.

## Adopted Budgets Were Not Structurally Balanced

The Council and City officials did not fully understand the impact of appropriating fund balance and issuing debt to pay for separation payments each year. As a result, they did not adopt structurally balanced budgets that provided for sufficient recurring revenues to finance recurring expenditures. Although the City's general fund balance has been declining since at least 2014-15, the Council appropriated fund balance totaling \$2.1 million from 2014-15 through 2016-17 to be used in the subsequent years' budgets (planned operating deficits).<sup>9</sup> Over the same period, the Council and City officials also underestimated expenditures and/or overestimated revenues, resulting in larger operating deficits and a greater reliance on fund balance than was planned in each of the four years (Figure 2).

**Figure 2: General Fund Budget-to-Actual Comparison**

	2014-15	2015-16	2016-17	2017-18
<b>Appropriations &amp; Other Uses</b>	\$74,140,053	\$74,949,717	\$78,829,227	\$81,798,874
<b>Actual Expenditures &amp; Other Uses</b>	\$74,923,368	\$76,927,050	\$78,479,778	\$80,426,615
<b>Variance</b>	(\$783,315)	(\$1,977,333)	\$349,449	\$1,372,259
<b>Percentage Variance</b>	-1.0%	-2.6%	0.4%	1.7%
<b>Estimated Revenues &amp; Other Sources</b>	\$72,640,053	\$74,314,717	\$76,580,682	\$80,961,329
<b>Actual Revenues &amp; Other Sources</b>	\$74,129,268	\$75,340,535	\$77,558,013	\$75,212,860
<b>Variance</b>	\$1,489,215	\$1,025,818	\$977,331	(\$5,748,469)
<b>Percentage Variance</b>	2.0%	1.4%	1.3%	-7.6%
<b>Appropriated Fund Balance (Planned Deficit)</b>	\$0	\$635,000	\$637,545	\$837,545
<b>Actual Operating Surplus/(Deficit)</b>	(\$794,100)	(\$1,586,515)	(\$921,765)	(\$5,213,755)

City officials indicated that much of the 2017-18 revenue shortfall included fees dependent on projects that were not completed (i.e., an \$866,000 shortage in licenses and permits relating to a large development project that fell through and a \$619,751 shortage in police fees due to a delay in implementing a new license plate reader system) and unusually bad weather that resulted in beach closures resulting in a \$662,215 shortage in beach charges. Another factor in the 2017-18 revenue shortage was the Council's decision to issue \$550,000 in bond anticipation notes (BANs) instead of \$1.62 million in bonds to pay for separation payments.

<sup>9</sup> City officials did not appropriate any fund balance from 2017-18 to the 2018-19 budget.

---

Additionally, the Council balanced the budgets from 2014-15 through 2017-18 by including a total of \$7 million in debt proceeds as anticipated revenue. The Council actually issued \$8 million of bonds from 2014-15 through 2016-17 and used another \$2.1 million of fund balance in 2017-18 to finance separation payments.

These practices contributed to the depletion of the general fund's fund balance to an unassigned fund deficit of \$813,994 at June 30, 2018 and the steady increase of debt service costs from 8.13 percent of 2014-15 general fund revenues to 12.27 percent of 2017-18 general fund revenues. The practice of issuing debt to finance recurring expenditures such as separation payments is imprudent because recurring expenditures should be funded by recurring revenue sources. Continued reliance on debt to fund recurring expenditures will diminish the City's ability to finance needed services in future budgets as the City will need to devote more of its limited resources to repay the principal and interest on the debt.

### **City Officials Did Not Adequately Monitor the Budget**

While the Council has overall responsibility for the City's operations, the former Council President dismissed this responsibility, saying that the Council is strictly a policy-making body and has nothing to do with day-to-day operations. At least three of the five Council members did not know the City had experienced operating deficits for five years straight<sup>10</sup> until they demanded the City's financial advisor prepare a report analyzing the budget. Additionally, the City's charter<sup>11</sup> requires the Comptroller to provide monthly statements on the City's financial condition to the Council. However, Council members informed us that they never see any statements other than the proposed budget, including a comparison of budget-to-actual expenditures, which contributes to their failure to monitor the City's financial condition. Furthermore, City officials have not ensured that the City's financial statements are audited timely, leaving the City to operate based on potentially inaccurate financial information for extended periods. On average, the Council received the last three years' audited financial statements 12 months after the fiscal year-end. The 2016-17 financial statements were not audited until 17 months after fiscal year-end. Significant adjustments were made as part of the audits, indicating that the Council did not have timely or accurate financial information to use in managing City finances during the year, or to use in developing the ensuing years' budgets.

---

<sup>10</sup> 2014-15, 2015-16, 2016-17, 2017-18 and projected for 2018-19

<sup>11</sup> City charter, Article 3, section 27(e)

Despite being unaware of the City’s financial condition, the Council continues to adopt resolutions authorizing budget transfers (transfers of available funds from one budget line to another) greater than \$1,500.<sup>12</sup> When the Council does not review periodic financial statements, it cannot detect budget shortfalls or address overspending timely. Furthermore, the Council cannot determine whether a shortfall is a temporary situation or an ongoing problem that could impact next year’s budget. Without this knowledge, the Council members have no way to know whether the proposed budget presented by the City Manager is reasonable and structurally balanced, or whether it might further exacerbate the City’s financial condition issues, before they vote whether or not to adopt that budget. Moreover, the Council never met to discuss the proposed 2019-20 budget, to make any amendments to the budget, or to vote on that budget’s adoption prior to the May 31 deadline established in the City’s charter.<sup>13</sup> As a result, the 2019-20 budget proposed by the City Manager became the City’s enacted budget for the 2019-20 fiscal year with no amendments or other actions imposed by the Council.

Although the Council has overall responsibility for the City’s operations, it has not taken steps to assure that it has timely and accurate financial information to monitor the City’s finances and completely failed to act on the 2019-20 budget.

### Interfund Advances Were Not Repaid

The general fund’s financial condition has deteriorated to an unassigned fund deficit of \$813,994 over the last four fiscal years. Over that same period, City officials have continued to make interfund advances from the general fund to the sewer and water funds each year to enable those funds to pay for certain expenditures, such as health insurance, without seeking short-term financing sources. As shown in Figure 3, the sewer and water funds were unable to repay these advances, thereby contributing to the general fund’s declining financial condition.

**Figure 3: Amount Owed to General Fund vs. Available Cash**

	June 30, 2015		June 30, 2016		June 30, 2017		June 30, 2018	
	Amount Owed	Available Cash	Amount Owed	Available Cash	Amount Owed	Available Cash	Amount Owed	Available Cash
<b>Water</b>	\$0	\$225,853	(\$138,560)	\$50	(\$211,779)	\$402	(\$286,779)	\$65,197
<b>Sewer</b>	(\$1,373,327)	\$14,096	(\$1,517,757)	\$50	(\$1,421,795)	\$95	(\$1,374,326)	\$21,687
<b>Total</b>	<b>(\$1,373,327)</b>	<b>\$239,949</b>	<b>(\$1,656,317)</b>	<b>\$100</b>	<b>(\$1,633,574)</b>	<b>\$497</b>	<b>(\$1,661,105)</b>	<b>\$86,884</b>

<sup>12</sup> City charter, Article 6, section 101(c) requires the Council to authorize all budget transfers greater than \$1,500 by resolution.

<sup>13</sup> City charter, Article 6, section 101-a

---

The Council did not authorize these advances from the general fund to the sewer and water funds and City officials do not have a formal plan to repay these advances, stating that the advances will be repaid as cash flow allows at the end of each year. Because the City Council does not monitor City finances these advances have gone unpaid or increased without a plan for repayment. It is unlikely that either fund will have sufficient money available to reimburse the general fund in the near future because the Council has not taken any action, such as raising rates, that would allow repayment. Therefore, these interfund advances will continue to have a detrimental effect on cash flow and the general fund's overall fiscal health. If the sewer and water funds are unable to repay the advance balance reported as of June 30, 2018, the general fund's total fund balance may be overstated by as much as \$1,661,105. Moreover, because the general fund is primarily funded by property taxes and the sewer and water funds from user charges, applying revenues generated by real property taxes to support the sewer and water funds may have caused an inequity to low-usage taxpayers and to City taxpayers because their tax dollars are being used to support sewer services to non-City residents.

### **The City Manager Did Not Prepare Multiyear Financial Plans**

The City Manager has not prepared a multiyear financial plan or a fiscal improvement plan for any of the City's funds. Such documents are especially important for the general fund, where unassigned fund balance has decreased approximately \$7.9 million from approximately \$7.1 million at July 1, 2014 to a deficit of \$813,994 at June 30, 2018. Furthermore, as of July 2019, preliminary operating results showed that the general fund ended the 2018-19 fiscal year with an \$800,000 operating deficit, resulting in the general fund's total unassigned fund deficit increasing to more than \$1.6 million at June 30, 2019.

Because the City Manager did not prepare a multiyear financial plan, including a fiscal improvement plan, there is no assurance that the City's financial condition will improve. The City's reliance on property taxes to finance operations has increased over the last four fiscal years, with property taxes going from 44 percent of total revenues and other sources in 2014-15 to 48.6 percent in 2017-18. Developing and continually updating a multiyear financial plan and fiscal improvement plan would have enhanced the City's ability to effectively manage finances and to consider economic factors that could negatively impact revenues such as sales tax and mortgage tax, as well as potential decreases in State aid and an approaching end to federal aid related to Federal Emergency Management Agency (FEMA) reimbursements. This could also assist the City Manager and the Council in addressing needs without overburdening taxpayers. The Council and other City officials must remain cognizant of future needs and available revenue streams when strategically planning.

---

In April 2019, the Council approved a resolution to retain a financial consulting firm to develop a multiyear fiscal improvement plan. The firm will conduct a comprehensive analysis of the City's fiscal condition and identify the root causes of structural imbalances.

### **What Do We Recommend?**

The Council should:

1. Adopt structurally balanced budgets which contain realistic estimates of revenues and finance recurring expenditures, including separation payments, with recurring operating revenues, instead of debt.
2. Familiarize itself with the City's adopted fund balance policy.
3. Obtain and review monthly Comptroller statements on the City's financial condition, as required by the City charter.
4. Ensure that all interfund advances are authorized and paid back by the end of the fiscal year as required by the GML.
5. Develop a plan for the water and sewer funds to repay the interfund advances from the general fund.

The Council and City officials should:

6. Replenish and maintain fund balance in accordance with the City's fund balance policy.

The City Manager should:

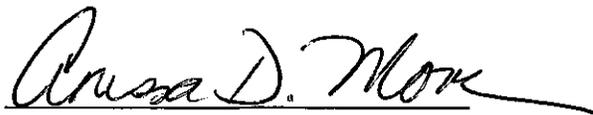
7. Prepare a multiyear financial plan.
8. Prepare a fiscal improvement plan that identifies the City's fiscal performance goals, establishes specific actions with quantifiable benefits and sets benchmarks to assess the progress of those specific actions taken.

## Appendix A: Response From City Officials<sup>13</sup>

---

### **The City Council of the City of Long Beach's Response to New York State Comptroller's Audits: City of Long Beach - Payments for Unused Leave Accruals 2019M-68 & Financial Condition 2019M-133**

Dated: November 22, 2019

By: 

Hon. Anissa Moore  
President, City Council  
City of Long Beach, NY

---

<sup>13</sup> The City's response references page numbers from the draft report that may have subsequently changed.

---

## 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 Capozzolo’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 aforescribed 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.

See Note 1 Page 25
--------------------------

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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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

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

---

<sup>1</sup> 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).

<sup>2</sup> Spencer v. Christ Church Day Care Ctr., 280 A.D.2d 817, 818 (3d Dept. 2001).

<sup>3</sup> Gallagher v. Ashland Oil, 183 A.D.2d 1033, 1034 (3d Dept. 1992).

<sup>4</sup> See also General Municipal Law 92.

---

*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...*”).

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.<sup>5</sup>

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 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*

---

<sup>5</sup> 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.

---

*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.’”<sup>6</sup> 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.”<sup>7</sup> 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.”<sup>8</sup> A principal is entitled to clawback any compensation paid to the employee during the period of disloyalty.<sup>9</sup>

### 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 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?

See Note 2 Page 25
--------------------------

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?

See Note 3 Page 25
--------------------------

---

<sup>6</sup> 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)).

<sup>7</sup> Feiger v. Iral Jewelry, Ltd., 41 N.Y.2d 928, 928 (1977) (citing Restatement (Second) of Agency (1958), § 469).

<sup>8</sup> Id. at 928-29.

<sup>9</sup> 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).

See  
Note 4  
Page 25

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.

## Appendix B: OSC Comments to the City's Response

---

### Note 1

Although the City Charter does provide authority for the City Manager, as Chief Executive Officer, to have day-to-day administrative responsibilities, the City Charter also provides, among other things, that the City Council may request that the City Manager communicate as to the affairs of the City in relation to its finances, government or improvements (see, City Charter, Article 3, section 20). The City Charter also requires that the Comptroller provide monthly statements on the City's financial condition to the City Council (see, City Charter, Article 3, section 27[e]). Therefore, in our view, the City Council still maintains general oversight of managing the City's financial condition.

### Note 2

It appears that the former Acting City Manager referenced in the City's response is the individual referred to as Corporation Counsel throughout our Report. In that case, the Report does address payments made to the former Acting City Manager, when the individual was serving as the City's Corporation Counsel (see, "Exempt Officers and Employees Receiving Draw Down Payments" section of Report 2019M-68).

### Note 3

As the two positions were not held concurrently, we reviewed this individual's payment based on the position and salary held at the time of separation.

### Note 4

The Comptroller's Office will provide further information to the City, as warranted.

## Appendix C: Audit Methodology and Standards

---

We conducted this audit pursuant to Article V, Section 1 of the State Constitution and the State Comptroller's authority as set forth in Article 3 of the New York State General Municipal Law. To achieve the audit objective and obtain valid audit evidence, our audit procedures included the following:

- We interviewed City officials regarding financial operations.
- We reviewed the City's fund balance policy.
- We performed trend analysis on fund balance and results of operations for the City's general, water and sewer funds for the audit period.
- We prepared budget-to-actual comparisons for appropriations and revenues to determine whether revenues and appropriations were reasonable and whether specific revenues and appropriations were consistently and significantly underestimated or overestimated.
- We compared debt issued from audited financial statements to budgeted debt and separation payments in Council-adopted budgets for the audit period.
- We analyzed interfund transfers and advances for the audit period.
- We reviewed the City's 2018-19 fund balance projections for the general, water and sewer fund.

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

Unless otherwise indicated in this report, samples for testing were selected based on professional judgment, as it was not the intent to project the results onto the entire population. Where applicable, information is presented concerning the value and/or size of the relevant population and the sample selected for examination.

A written corrective action plan (CAP) that addresses the findings and recommendations in this report should be prepared and provided to our office within 90 days, pursuant to Section 35 of General Municipal Law. For more information on preparing and filing your CAP, please refer to our brochure, *Responding to an OSC Audit Report*, which you received with the draft audit report. We encourage the Council to make the CAP available for public review in the City Clerk's office.

## Appendix D: Resources and Services

---

### **Regional Office Directory**

[www.osc.state.ny.us/localgov/regional\\_directory.pdf](http://www.osc.state.ny.us/localgov/regional_directory.pdf)

### **Cost-Saving Ideas** – Resources, advice and assistance on cost-saving ideas

[www.osc.state.ny.us/localgov/costsavings/index.htm](http://www.osc.state.ny.us/localgov/costsavings/index.htm)

### **Fiscal Stress Monitoring** – Resources for local government officials experiencing fiscal problems

[www.osc.state.ny.us/localgov/fiscalmonitoring/index.htm](http://www.osc.state.ny.us/localgov/fiscalmonitoring/index.htm)

### **Local Government Management Guides** – Series of publications that include technical information and suggested practices for local government management

[www.osc.state.ny.us/localgov/pubs/listacctg.htm#lmgm](http://www.osc.state.ny.us/localgov/pubs/listacctg.htm#lmgm)

### **Planning and Budgeting Guides** – Resources for developing multiyear financial, capital, strategic and other plans

[www.osc.state.ny.us/localgov/planbudget/index.htm](http://www.osc.state.ny.us/localgov/planbudget/index.htm)

### **Protecting Sensitive Data and Other Local Government Assets** – A non-technical cybersecurity guide for local government leaders

[www.osc.state.ny.us/localgov/pubs/cyber-security-guide.pdf](http://www.osc.state.ny.us/localgov/pubs/cyber-security-guide.pdf)

### **Required Reporting** – Information and resources for reports and forms that are filed with the Office of the State Comptroller

[www.osc.state.ny.us/localgov/finreporting/index.htm](http://www.osc.state.ny.us/localgov/finreporting/index.htm)

### **Research Reports/Publications** – Reports on major policy issues facing local governments and State policy-makers

[www.osc.state.ny.us/localgov/researchpubs/index.htm](http://www.osc.state.ny.us/localgov/researchpubs/index.htm)

### **Training** – Resources for local government officials on in-person and online training opportunities on a wide range of topics

[www.osc.state.ny.us/localgov/academy/index.htm](http://www.osc.state.ny.us/localgov/academy/index.htm)

## Contact

Office of the New York State Comptroller  
Division of Local Government and School Accountability  
110 State Street, 12th Floor, Albany, New York 12236

Tel: (518) 474-4037 • Fax: (518) 486-6479 • Email: [localgov@osc.ny.gov](mailto:localgov@osc.ny.gov)

[www.osc.state.ny.us/localgov/index.htm](http://www.osc.state.ny.us/localgov/index.htm)

Local Government and School Accountability Help Line: (866) 321-8503

---

**HAUPPAUGE REGIONAL OFFICE** – Ira McCracken, Chief Examiner

NYS Office Building, Room 3A10 • 250 Veterans Memorial Highway • Hauppauge, New York  
11788-5533

Tel (631) 952-6534 • Fax (631) 952-6091 • Email: [Muni-Hauppauge@osc.ny.gov](mailto:Muni-Hauppauge@osc.ny.gov)

Serving: Nassau, Suffolk counties



Like us on Facebook at [facebook.com/nyscomptroller](https://facebook.com/nyscomptroller)

Follow us on Twitter [@nyscomptroller](https://twitter.com/nyscomptroller)