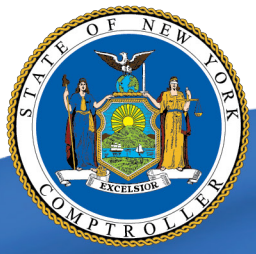
DIVISION OF LOCAL GOVERNMENT AND SCHOOL ACCOUNTABILITY

REPORT OF EXAMINATION | 2019M-68

City of Long Beach

Payments for Unused Leave Accruals

DECEMBER 2019



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

Contents

Report Highlights

City of Long Beach

Audit Objective

Assess whether payments to certain City officers and employees for unused leave accruals were authorized and accurately calculated.

Key Findings

- The City approved $6 million in separation payments to 43 City officers and employees, of which $513,925 in payments to 10 individuals appear inconsistent with the City's code of ordinances (City Code) and/or collective bargaining agreements (CBAs).
- The City approved drawdown payments for unused leave accruals, totaling $229,494 to eight City officers and employees at a time other than at separation from service. In the absence of specific authorization for such payments, we question the appropriateness of $224,852, or 98 percent of such payments.
- The City failed to take adequate corrective action in response to two prior audits that cited leave payments that were inconsistent with the City Code or contractual agreements.

Key Recommendations

- Amend the City Code to clarify how the City intends to compensate officers and employees for unused leave accruals subject to the City Code.
- Review the separation and drawdown payments identified in this report and seek recovery of such payments that are inconsistent with the City Code or any other applicable laws.

We conducted two separate audits of the City, one on financial condition and the other on leave accrual payments. The City submitted one 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	
Number of Employees	820
2018-19 Appropriations	$94.5 million
2017-18 Separation Payments	$1.78 million
2017-18 Unused Leave Payments (Drawdowns)	$247,389

Audit Period

July 1, 2017 – June 30, 2018.

For all officers and employees who received any part of their separation payments during this period, we extended our scope back to July 1, 2012 to review the entirety of those separation payments.

Payments for Unused Leave Accruals

The City made separation payments totaling $1.78 million to 43 officers and employees[1] from July 1, 2017 to June 30, 2018. These payments were made as part of the total $6 million in separation payments that the City approved for these officers and employees from 2012 through 2018. During our audit period, the City also paid $229,494 to eight exempt officers and employees for unused leave accruals at times other than at separation from service.

How Should Payments for Unused Leave Accruals Be Made?

In addition to established wages and salaries, cities generally have the authority to make cash payments of the monetary value for all, or a portion, of an officer's or employee's earned, but unused, leave accruals when the officer or employee separates from service. A city may also provide for an officer or employee to receive the cash value of a portion of his or her accrued unused leave accruals at a time other than when separating from service.

Authority to make such payments may be pursuant to a CBA or, in the case of an exempt[2] officer or employee not covered by an individual employment agreement, by a preexisting local enactment, such as a city code. However, in the absence of a preexisting local enactment or agreement, courts have found that the city should not make such payments.

Payments for unused leave accruals can represent significant expenditures for a city. As such, city officials must sufficiently review any such payments to be made and ensure they are properly calculated, adequately supported and authorized in accordance with a preexisting CBA, employment agreement, city code or other local enactment so that officers and employees are paid only the amounts to which they are entitled.

Separation Payments Were Made to Certain Exempt Officers and Employees

The City Code addresses leave benefits, including separation from service benefits, for exempt officers and employees not covered by an individual employment agreement.[3] Among other things, the City Code describes the

1 This included seven exempt officers and employees, 28 Civil Service Employee Association (CSEA) employees, five lieutenants and Patrolmen's Benevolent Association (PBA) employees and three Uniformed Firefighters' Association employees.

2 We were informed by City officials that employees and officers who hold appointed positions are classified as "exempt" and are not covered by a CBA. Their leave accrual and separation payment benefits are governed by the City Code's Article II, chapter 19.

3 The City Charter provides that the Council "may enter into a written employment agreement with the City Manager for a term not to exceed three years and upon such terms and conditions as the [Council] shall agree." Based on our reading of a former City Manager's agreement, it appears that the former City Manager was entitled to the same leave benefits, including separation from service benefits, as provided for by the City Code for exempt employees.

following benefits for sick and vacation leave to be conferred upon exempt officers and employees:

- Sick Leave: The City Code provides that, "all exempt employees shall accrue sick leave time at the rate of one and one-quarter (1¼) days per month" and "upon termination of employment, exempt employees are entitled to payment in cash for the same number of accumulated sick days at the rate of 30 percent of the total number of days accrued, multiplied by the pay rate at the time of termination." The Code also provides that, "any exempt employee 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…sick leave…up to the limits as set forth in this article."
- Vacation Leave: The City Code provides that, "exempt employees shall be entitled to the same vacations available to civil service employees pursuant to the collective bargaining agreement then in effect."[4] The City Code also states that, "any exempt employee 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…up to the limits as set forth in this article." Therefore, although the City Code provides that the Council may allow an exempt employee to accrue and carry into the next year more than 50 vacation days if good cause is shown, the City Code also expressly states that, "[i]n no event will an employee be entitled to cash equivalent of more than fifty (50) vacation days at the time of his/her termination, resignation, or other leaving from city employment."

City officials informed us that claim vouchers for separation payments to exempt officers and employees are prepared by the payroll clerk and include documentation supporting the calculations, which are based on an eight-hour standard day. Each claim voucher is subsequently reviewed and certified by the appropriate department head, as well as the City Comptroller and finally approved by the City Manager. The Council does not review separation payments.

During our audit period, the City approved and paid separation payments totaling $260,894 to seven exempt officers or employees. The payments to all seven of these individuals included a total of $112,131 (1,633.25 hours), or 43 percent of their total separation payments, that appear to exceed the amounts set forth in the City Code and/or Council-approved employment contracts for either accrued vacation leave or accrued sick leave.

4 City officials informed us that the civil service CBA to which the City Code refers is the CSEA CBA. The CSEA CBA in place during our audit period appears to allow CSEA employees to accumulate up to 80 days of vacation leave and, upon separating from service, be paid for all unused accrued vacation pay, not to exceed 80 days.

Figure 1: Questionable Separation Payments to Exempt Officers and Employees

Title at Time of Separation	Accrual Type	Hours in Question	Amount
City Manager (resigned 1/1/18)	Vacation	19.23	$1,601
	Sick	614.60	$51,179
Comptroller A (resigned 7/27/17)	Sick	354.04	$25,824
Comptroller B (resigned 1/3/18)	Sick	186.28	$14,480
Secretary To Labor Relations (resigned 10/14/17)	Sick	92.30	$5,746
Deputy Comptroller (terminated 11/18/17)	Sick	160.41	$6,547
Planner (resigned 8/2/17)	Sick	104.83	$3,323
Secretary to the City Manager (resigned 1/1/18)	Sick	101.56	$3,431
Totals		**1,633.25**	**$112,131**

For example, a former City Manager received a separation payment of $108,022. This amount included $73,113 for 100 percent of his 878 unused sick hours or 614.60 hours ($51,179) more than the City Code's stated rate of 30 percent, which we calculated as 263.40 sick hours totaling $21,934. In addition, this individual received $34,910 for 419.23 unused vacation hours which we calculated as 19.23 hours ($1,601) more than the 50 vacation days set forth by the City Code. Consequently, in the absence of a preexisting ordinance or local law amending the City's Code, an amendment to the former City Manager's employment contract or a court decision/order stating otherwise, we question whether the payment to the former City Manager in the amount of $52,780, or 48.9 percent of the total payment is consistent with this individual's employment agreement with the City.

When we inquired about why leave payments upon separation exceeded the amounts stated in the City Code, the City's Acting Comptroller and Corporation Counsel staff stated 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. In addition, Corporation Counsel staff said that there was nothing restricting the City Manager from providing exempt employees with more than the minimum entitlement set forth in the City Code. If it was the intent of the City, as part of the retirement/separation incentive, to change the leave entitlement terms of the City Code, the Council should have amended the City Code to specify the new terms for leave payments.

The Acting Comptroller informed us that former City Managers had provided incentives to individuals as far back as 2008 where the City paid out up to 100 percent of sick leave. In addition, the Payroll Supervisor stated that it has been

the City's practice since at least 2014 to pay exempt employees 100 percent of all accumulated leave balances at separation. Furthermore, Corporation Counsel staff informed us that it has been the City's unwritten policy to grant exempt employees the leave accrual and separation payment benefits given to CSEA employees. However, the Corporation Counsel staff could not provide details about who had approved this unwritten policy, when it went into effect or why an unwritten policy would supersede the City Code.

There was no indication that the Council ever amended the City Code to reflect this interpretation or unwritten policy change. Therefore, in the absence of an ordinance, local law or court decision/order providing authority to convert up to 100 percent of exempt officer and employees' accumulated unused vacation and sick leave into cash, we question the appropriateness of such payments for vacation leave in excess of 50 days and sick leave in excess of 30 percent of the total days accrued at the time of separation from service that is stated in the City Code.

Police Separation Payments

Based on our review of the City's Patrolmen's Benevolent Association (PBA) CBA and subsequent arbitration agreement, it appears that officers[5] and employees covered under the agreement and hired before May 2013, are entitled to a cash payment, at time of separation, for up to 400 vacation hours (50 days), 1,600 sick hours (50 percent of 400 days) and the balance of unused personal hours.[6] The PBA CBA also authorizes a cash payment for up to 480 hours of compensatory time.[7] However, the City's separation payments, in some instances, appear inconsistent with the language set forth in the PBA CBA and arbitration agreement.

The City authorized separation payments to the five PBA employees we reviewed totaling $1,907,175 and paid $471,799 of this amount during our audit period. A lieutenant prepares separation payment claim vouchers for PBA employees, including documentation supporting the payment calculation. The Police Commissioner and City Comptroller review and certify each separation payment claim, which the City Manager then approves. The Council does not review separation payment claims for PBA employees.

5 Corporation Counsel staff stated that although lieutenants are no longer part of the PBA as of April 2013, they continue to follow the terms of the PBA CBA.

6 It is our understanding that the authority of the separation payments as set forth in the May 29, 2013 arbitration award was applicable during our audit period because City officials stated that there has been no new PBA CBA, arbitration award or other court order/decision since that date.

7 Under the Fair Labor Standards Act (FLSA or Act), compensatory time is leave time that the City may grant to, among others, public safety employees in lieu of paying overtime. According to the FLSA, employees who are subject to the Act and are engaged in a public safety activity may accrue up to 480 hours of compensatory time for hours worked after April 15, 1986. If covered by the Act, the FLSA provides that time earned in excess of a 480 hour balance is to be paid as overtime to that individual.

We reviewed the calculation for these five authorized separation payments. We found that, for three of the five separation payments, the City included $401,794 more than what appears to be authorized by the PBA CBA. Specifically, as shown in Figure 2, the payments to a police sergeant, a police officer and a police lieutenant included separation payments totaling $51,862 for 768.59 vacation hours above the amount stated in the CBA and arbitration agreement for separation payments. The separation payments for these three employees also included payments totaling $349,932 for 4,515.66 hours of compensatory time above the 480 hours set forth in the CBA.

Figure 2: PBA Vacation Separation and Compensatory Time Payments

	Police Sergeant		Police Officer		Police Lieutenant		Totals	
	Hours	Amount	Hours	Amount	Hours	Amount	Hours	Amount
Vacation Paid	727.61	$59,333	693.71	$48,949	547.27	$38,393	1,968.59	$146,675
Vacation Separation Payment Per CBA/ Arbitration Agreement	400.00	$34,891	400.00	$29,194	400.00	$30,728	1,200.00	$94,813
Difference	**327.61**	**$24,442**	**293.71**	**$19,755**	**147.27**	**$7,665**	**768.59**	**$51,862**
Compensatory Time Paid	2,476.75	$204,055	1,891.23	$138,017	1,587.68	$121,636	5,955.66	$463,708
Compensatory Time Accrual Per CBA	480.00	$41,870	480.00	$35,032	480.00	$36,874	1,440.00	$113,776
Difference	**1,996.75**	**$162,185**	**1,411.23**	**$102,985**	**1,107.68**	**$84,762**	**4,515.66**	**$349,932**

City Police Department officials stated that it has always been their practice to pay PBA employees for all accumulated vacation and compensatory time at separation. However, the payment of accumulated vacation upon separation from service, in some cases, appears to be inconsistent with the language set forth in the CBA and arbitration agreement. Officials could not provide us with documentation that the practice of paying for leave amounts in excess of amounts provided for by the City Code was approved by the Council. This can result in additional costs to the City that are significantly higher than the adopted budget. Furthermore, although we believe the employees were entitled to payment of their accrued compensatory time in excess of 480 hours, by allowing employees to accrue more than 480 hours of compensatory time, the City may not be complying with the FLSA. Although compliance with the FLSA was not part of our audit scope, City officials should ensure that their compensatory time practices comply with the Act.

Exempt Officers and Employees Received Drawdown Payments

The City may allow for an officer or employee to receive the cash value of a portion of his or her accrued unused leave accruals at a time other than during separation from service. In the case of an exempt officer or employee not covered by an individual employment agreement, the authority to allow for such payments may be pursuant to a preexisting local enactment, such as the City Code. However, in the absence of a preexisting local enactment, individual employment agreement or court decision/order, we question whether the City may make such cash payments.

The City's Code does address leave benefits of exempt officers and employees, including separation from service benefits, of individuals who are exempt and not covered by a CBA or individual employment agreement. However, we found no indication of the City Charter or City Code directly addressing the authority to provide drawdown payments for unused leave accruals, such as vacation and sick leave. Instead, we have been informed by City officials that allowing union and non-union employees to sell back (i.e., drawdown) accumulated leave time has been a long-standing practice of the City. However, City officials could not provide documentation that the Council had approved these drawdown payments.

The City Code does provide, in part, that exempt officers and employees are entitled to the same vacations (i.e., time) available to CSEA employees pursuant to the CBA then in effect. In that case, the City's CSEA CBA authorizes covered employees, with prior approval of the City Manager, to work through up to one week (40 hours) of vacation and be paid their regular pay for that week plus straight time for the accumulated vacation hours. City officials refer to this benefit as a drawdown of accruals. Reading the City Code and CSEA CBA together may suggest that an exempt employee is permitted to request drawdown payments of his or her vacation leave, provided that the payment does not exceed one week of vacation. City officials could not provide us with a similar provision for the drawdown of sick leave accruals in either the CSEA CBA or the City Code.

During our audit period, the City paid eight exempt officers and employees[8] a total of $229,494 in drawdown payments for unused leave accruals. In the absence of a preexisting local enactment, individual employment agreement or court decision/order specifically authorizing such payments, we question the appropriateness of drawdown payments of $224,852 (98 percent) paid to the eight officers and employees.

8 Deputy City Manager, Deputy City Clerk, Economic Development Director, Public Relations Director, Community Development Director, Executive Assistant to the City Manager, Secretary to the City Manager and Corporation Counsel.

On November 15, 2017, the City paid the Corporation Counsel[9] (an exempt officer still employed by the City) $119,855 for 80 percent of his unused leave accruals (1,030.85 sick hours and 568.74 vacation hours) according to the terms of an agreement reached with the City in exchange for Corporation Counsel delaying his proposed resignation. The remaining 20 percent would be paid within 10 days of Corporation Counsel's actual separation from City service. According to the original agreement, signed December 8, 2016, Corporation Counsel would delay his resignation until at least January 27, 2017 in exchange for, among other things, 100 percent of his accrued leave to be paid within 10 days of separation. Corporation Counsel and the City amended the agreement on October 8, 2017 to provide that Corporation Counsel receive 80 percent of the payment while still employed by the City.

However, similar to the concerns raised with other exempt officers and employees, in the absence of a preexisting ordinance, local law or court decision/order providing authority to convert up to 100 percent of the exempt employees' unused vacation and sick leave accruals into cash, it is unclear whether the City could enter into this agreement with Corporation Counsel to provide a "terminal payout" that appears inconsistent with the City's Code for exempt employees' separation from service payments.[10] Furthermore, we question whether the amended terms of the agreement, along with the City's long-standing practice of allowing exempt officers and employees to drawdown sick leave accruals and/or more than one week of vacation accruals, would be sufficient to allow the City to pay Corporation Counsel 80 percent of his unused leave accruals in light of applicable case law. Under the terms of the City Code, it appears that the Corporation Counsel's drawdown of accruals should be limited to 40 hours (one week) of accrued vacation or $2,918.

In addition to the payment to Corporation Counsel, the City paid $109,639 in drawdown payments to seven exempt employees in exchange for unused leave accruals. As shown in Figure 3, $107,915 or 98.4 percent of these payments were not addressed in the City Code.

9 The individual referred to as Corporation Counsel throughout our report became Acting City Manager as of January 30, 2019 and resigned the positions of Acting City Manager and Corporation Counsel as of October 1, 2019.

10 As previously discussed, the City Code indicates that exempt employees are entitled to separation payouts of 30 percent of the employee's accrued sick leave balance and not more than 50 days (400 hours) of accrued vacation leave, multiplied by the employee's pay rate at the time of separation.

Figure 3: Exempt Officer and Employee Drawdowns

Job Title	Vacation		Sick		Total Questionable Payments
	Hours (over first 40)	Amount	Hours	Amount	
Secretary to City Manager	82.83	$2,798	203.80	$6,884	$9,682
Economic Development Director	0.00	$0	483.43	$25,741	$25,741
Deputy City Clerk	0.00	$0	316.62	$10,438	$10,438
Community Development Director	0.00	$0	22.62	$813	$813
Executive Assistant to City Manager	0.00	$0	235.74	$8,512	$8,512
Deputy City Manager	0.00	$0	564.58	$35,412	$35,412
Public Relations Director	0.00	$0	392.06	$17,317	$17,317
Total	**82.83**	**$2,798**	**2,218.85**	**$105,117**	**$107,915**

Again, in the absence of a preexisting local enactment, individual employment agreement or court decision/order providing otherwise, we question whether the City should have made these cash payments.

The City's Corrective Action is Lacking After More Than 25 Years

Among other reports to the City, OSC has previously issued reports in 1992 and 1996[11] that identified a number of instances when the City paid officers and/or employees for unused leave accruals that were inconsistent with the City Code and negotiated CBAs. In each report, we recommended that the Council establish internal control procedures to ensure payments are made in accordance with the City Code and CBAs and to adopt local laws or ordinances so that the City Code reflects the Council's intent with regards to exempt employees' leave accrual and separation/termination payment benefits.

Although the City did amend City Code sections addressing personnel code in 1997 in an apparent attempt to address our concerns, similar conditions continue to exist more than 25 years after the first report, with City officials still saying they paid employees for leave based on long-standing policy instead of adhering to the City Code. As noted above, by paying officers and employees for unused leave accruals in a manner that appears inconsistent with the language set forth in the City Code and CBAs, the City may incur increased costs. These increased costs may significantly exceed the City's adopted budget and contribute to its declining financial condition.[12]

11 See reports 1992M-387 and 1996M-150

12 See report 2019M-133, Financial Condition

What Do We Recommend?

The Council should:

1. Amend the City Code, by local law or ordinance, to reflect how the City intends to pay exempt employees for unused leave accruals, both during employment (i.e., drawdowns) and upon separation from City service.

2. Approve any proposed changes or exceptions (i.e., retirement incentives) to separation payment terms contained in CBAs, the City Code and/or Council-approved employment contracts, as appropriate.

3. Review the separation and drawdown payments identified in this report and seek recovery of such payments that are inconsistent with the City Code or any other applicable laws.

4. Review the calculations and supporting documentation for officer and employee separation payments and drawdowns before making payment.

5. Develop and implement a corrective action plan to effectively address the concerns and recommendations identified in this, and any previous, reports.

City officials should:

6. Consider consulting with the United States Department of Labor to help ensure that the City's police compensatory time practices are in compliance with the FLSA.

7. Ensure that employee separation payments and drawdowns comply with the terms of negotiated CBAs, the City Code and/or Council-approved employment contracts.

Appendix A: Response From City Officials[13]

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: Anissa D. Moore

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

13 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 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.

See Note 1 Page 26

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) 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:

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[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).
[4] 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.[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 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

[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.

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 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 26

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 26

[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).

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.

See Note 4 Page 26

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).

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 and staff to gain an understanding of how payments for unused leave accruals are calculated, approved and processed.
- We reviewed CBAs, individual employment agreements and retirement incentives to assess if payments for unused leave accruals were authorized.
- The City approved separation payments from 2012 through 2018 totaling $16.4 million to 171 officers and employees, including $1.78 million that the City paid to 43 officers and employees from July 1, 2017 to June 30, 2018 as part of the total $6 million in separation payments that the City approved for these officers and employees from 2012 through 2018. In order to assess whether there was a systemic problem in how separation payments were calculated and paid, we reviewed the separation payment voucher for each of these 43 officers and employees to evaluate whether their total separation payments had been authorized and accurately calculated.
- During our audit period, the City paid eight exempt employees a total of $229,494 for "drawdowns." We reviewed all drawdown payments to assess whether they were authorized, accurately calculated and complied with the terms of the City Code.

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

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

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#lgmg

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

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

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

Contact

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