

CALENDAR

for

SPECIAL MEETING OF THE COUNCIL

of the

CITY OF LONG BEACH

held

FRIDAY, OCTOBER 11, 2019

1. Resolution to Ratify a Letter as an Official Communication of the City Council of the City of Long Beach, and Directing the Acting City Manager to Transmit Same, for the Purpose of Rescinding a Previously Submitted Response to the Office of the New York State Comptroller Draft Report of Examination Number 2019M-68.

October 11, 2019

Item No. 1
Resolution No.

The following Resolution was moved by
and seconded by :

Resolution to Ratify a Letter as an Official Communication of the City Council of the City of Long Beach, and Directing the Acting City Manager to Transmit Same, for the Purpose of Rescinding a Previously Submitted Response to the Office of the New York State Comptroller Draft Report of Examination Number 2019M-68.

WHEREAS, the Office of the New York State Comptroller (“OSC”) conducted two audits, resulting in the issuance of two draft Reports of Examination entitled “Payments for Unused Leave Accruals 2019M-68” and “Financial Condition 2019M-133”; and

WHEREAS, the OSC, in a letter dated August 29, 2019, from Chief Examiner Ira McCracken, transmitted with the draft audits, wrote “Because these findings are still subject to change, we ask that, to the maximum extent permitted by law, the information contained in these documents be kept confidential until we formally release the reports of examination from Albany. We also ask that by Monday September 30, 2019, an appropriate official of the City of Long Beach send to our Hauppauge Regional Office a letter responding to our preliminary draft findings”; and

WHEREAS, the OSC provided the City of Long Beach with a publication entitled “Responding to an OSC Audit Report: Audit Responses and Corrective Action Plans” (the “Comptroller Publication”) which states “You will have 30 days from the date the draft audit report is provided to you to respond, although we encourage a shorter response time whenever possible”; and

WHEREAS, the Comptroller Publication further states “We accept only one response from your local government. The response should [b]e signed by the chairman of the governing board or the chief executive officer or someone acting on his or her behalf.... There is one exception to the one response rule: if our audit report has findings relating to a separately elected official’s office or department (like a town clerk or a highway superintendent), then that separately elected official may also respond on his or her own behalf”; and

WHEREAS, the Acting City Manager/Corporation Counsel assigned an Assistant Corporation Counsel in conjunction with outside legal counsel to act on behalf of the City of Long Beach to submit a response to “Payments for Unused Leave Accruals 2019M-68,” only, with his full legal authority, while recusing himself from any type of involvement with said response; and

WHEREAS, on September 11, 2019, a Municipal Auditor 1 from the Office of the New York State Comptroller transmitted an email to the Acting City Manager/Corporation Counsel and City Clerk stating that “We would like to schedule an exit conference to discuss our audit findings with City officials. Typically, we meet with the Council President, City Manager and City Comptroller at this meeting. If any other Council member would like to meet with us, we would have to schedule separate meetings as our policy is to meet with one Council member at a time” and further provided that the NYS Comptroller is available to meet on September 20, 2019, September 23, 2019, or September 27, 2019; and

WHEREAS, the Acting City Manager/Corporation Counsel transmitted the September 11, 2019 email from the Municipal Auditor 1 to the entire City Council of the City of Long Beach as well as the City Comptroller and directed the Assistant Corporation Council charged with overseeing the submission of a response to: (1) “arrange a meeting with all of the necessary individuals”; (2) to attend the meeting with outside legal counsel; and (3) to have the response prepared prior to the exit conference; and

WHEREAS, an exit conference between the NYS Comptroller and “the necessary individuals,” which per OSC’s direction included the City Council President, City Comptroller, as well as the Assistant Corporation Counsel and outside legal counsel assigned to act on behalf of the City of Long Beach, was scheduled for Monday September 23, 2019, at 10 a.m.; and

WHEREAS, outside legal counsel and Assistant Corporation Counsel, acting on behalf of the City of Long Beach, drafted a response to “Unused Leave Accruals 2019M-68” (the “Response”), which is incorporated by reference herein, made a part hereof, and is more fully described below; and

WHEREAS, the Response was provided to all attendees of the exit conference, which included members of the OSC, Chief Examiner Ira McCracken, the City Council President, and City Comptroller; and

WHEREAS, the City Council President requested permission from the OSC, at the exit conference, for the City Council to supplement and submit an additional response which was agreed to by the OSC staff; and

WHEREAS, the Assistant Corporation Counsel present at the exit conference made it clear that the Assistant Corporation Counsel and outside counsel that drafted the Response were acting on behalf of the City of Long Beach and with the full authority of the City Manager/Corporation Counsel in submitting the City of Long Beach’s Response and asked what needed to be done to submit the Response in that official capacity; and

WHEREAS, at the exit conference, the Assistant Corporation Counsel was directed by Chief Examiner Ira McCracken to submit the fully executed Response via email along with a cover letter from the Assistant Corporation Counsel, which was done immediately after the exit conference pursuant to the Chief Examiner’s direction; and

WHEREAS, subsequent to submission of the Response, Council Members Bendo and Mandel (constituting a minority of the City Council which cannot represent the City Council as a body) sent a communication dated September 23, 2019, which requested an extension of time from the OSC to submit some type of an additional response; and

WHEREAS, on September 25, 2019, Chief Examiner McCracken responded to Council Members Bendo and Mandel, while copying all City Council Members, and in contradiction to the OSC’s prior representation to Council President Moore and others, iterated that OSC will accept “only one response” which must be “signed by the chairman of the governing board or the chief executive officer or someone acting on his or her behalf”; and

WHEREAS, despite already receiving a Response from individuals acting at the direction of the chief executive officer to submit the Response on behalf of the City of Long Beach per Chief Examiner McCracken's explicit direction, Chief Examiner McCracken's September 25, 2019 letter goes on to state "Therefore, we await the City Council's response and will entertain any reasonable requests for an extension requested by the Council as a body. We further expect that the City Council's reply will clarify the nature of the Capozzolo response; whether this is endorsed as the Council's response, and, if not, on what official's behalf that response was submitted"; and

WHEREAS, on September 25, 2019, Acting City Manager Mirando sent a signed letter to Chief Examiner Ira McCracken expressing that the NYS Comptroller had already received the City of Long Beach's Response, that he was aware of same, and that the Response received by the NYS Comptroller "represents the full and official response of the City of Long Beach." The letter further expressed, in furtherance of the City Council's prior request, that he has "no objection to the City Council members submitting their own individual responses or the Comptroller's office giving them a reasonable extension of time" to do so. Finally, the letter concluded by stating that "the City's full and official response has already been submitted"; and

WHEREAS, Council Members Bendo and Mandel, a minority of the City Council which cannot represent the City Council as a body, sent another letter dated September 27, 2019, expressing that Acting City Manager Mirando's response was sent without prior notice or discussion with the full Council and should be rejected and not considered the City's official response; and

WHEREAS, on October 1, 2019, and subsequent to the September 30, 2019, deadline for a response set by the NYS Comptroller, a Council majority consisting of Vice President Bendo, Council Member Mandel, and President Moore, sent an unofficial communication purportedly taking official action outside the context of a public meeting and without compliance with New York State's Open Meetings Law, stating: "(1) The draft audit response prepared by Mr. Capozzolo and submitted by Mr. Kalnitsky (the "Capozzolo Response") is not approved by the City Council; (2) Without the benefit of new, independent counsel, we are not in a position, at this time, to respond on the merits to anything contained in the Capozzolo Response; and (3) For the same reason, we are not in a position, at this time, to respond to the draft audit"; and

WHEREAS, on October 4, 2019, Chief Examiner Ira McCracken accepted and replied to the October 1, 2019, letter sent by Vice President Bendo, Council Member Mandel, and President Moore stating the NYS Comptroller was only in receipt of one response to the report "ostensibly" submitted on behalf of the City and requested that the City Council advise OSC whether it "formally rescinds the Capozzolo Response as the City's official response" and, if the Response were to be rescinded by the City Council, OSC would agree to extend the City's time to provide an official response to the draft Report "until November 11, 2019, six weeks beyond the original September 30, 2019, response date"; and

WHEREAS, OSC Chief Examiner McCracken further advised, in a private conversation with a single Council Member on October 9, 2019, that the OSC does not require

that the City Council take official action at a public meeting to rescind the Response, which is in contravention of the City Charter, the City of Long Beach Code of Ordinances, and New York State's Open Meetings Law; and

WHEREAS, Vice President Bendo informed Acting City Manager Mirando that, in accordance with Section 72 of the City Charter of the City of Long Beach, he would be calling for a special meeting of the City Council to take place Friday, October 11, 2019 at 7 A.M. and requested that Acting City Manager Mirando direct the Corporation Counsel to prepare a resolution rescinding Mr. Capozzolo's response to the OSC Draft Report 2019M-68; and

WHEREAS, the Response analyzed decades of data retrieved from the City Comptroller's Office to expand the inquiry of the NYS Comptroller's audit, which discovered "questionable payments" made to individuals outside of the audit period as well as individuals who were inexplicably omitted from inside the audit period; and

WHEREAS, the Response "welcomed" and "understood" all recommendations from the OSC, including the recommendation to claw back "questionable payments," while identifying factual circumstances and legal analyses that were not addressed by the Comptroller's draft report entitled "Unused Leave Accruals 2019M-68" which may materially affect the OSC's draft report and the ability of the City to seek recovery of any payments, and seeking the OSC's guidance with same; and

WHEREAS, the Response does not, in any way, take any position on behalf of individuals implicated in the draft "Unused Leave Accruals 2019M-68," and simply raises legal issues the City of Long Beach will have to address in clawing back funds and asks for the OSC's assistance and guidance in implementing the OSC recommendations; and

WHEREAS, Council Member Mandel, Vice President Bendo, and President Moore have expressly indicated they are not "in a position, at this time, to respond on the merits to anything contained in the Capozzolo response" and are "not in a position, at this time, to respond to the draft audit"; and

WHEREAS, despite all of the foregoing, the City Council is still desirous of rescinding the Response; and

WHEREAS, the City Council, as of the date of this Resolution, has not responded and has no intention of submitting a response to the draft report of examination entitled "Financial Condition 2019M-133," highlighting a multi-million dollar structural deficit in the City of Long Beach's budget; and

WHEREAS, New York State Public Officers' Law Section 103(e) provides "Agency records available to the public pursuant to article six of this chapter, as well as any proposed resolution, law, rule, regulation, policy or any amendment thereto, that is scheduled to be the subject of discussion by a public body during an open meeting shall be made available, upon request therefor, to the extent practicable as determined by the agency or the department, prior to or at the meeting during which the records will be discussed. . . . If the agency in which a public body functions maintains a regularly and routinely updated website and utilizes a high

speed internet connection, such records shall be posted on the website to the extent practicable as determined by the agency or the department, prior to the meeting” and consistent therewith, a copy of the Response as well as the proposed October 11, 2019 letter to be sent on behalf of the City Council has been published on the City of Long Beach’s website for the public to access; and

WHEREAS, the official action contemplated herein, to rescind a response to a draft audit, is hereby designated a “Type II” action under the New York State Environmental Quality Review Act (“SEQRA”) requiring no further environmental review;

NOW, THEREFORE, be it

RESOLVED, by the City Council of the City of Long Beach, New York, that all “Whereas” clauses are incorporated by reference herein and made a part hereof. That the Response previously submitted by the City of Long Beach to the OSC is incorporated by reference and made a part hereof. That the City Council of the City of Long Beach, New York hereby declares that the Response submitted on behalf of the City of Long Beach to the OSC on September 23, 2019, and incorporated by reference herein, is hereby rescinded and that the City Council of the City of Long Beach officially ratifies the proposed letter to the OSC dated October 11, 2019, which is also incorporated by reference herein and made a part hereof, and that said letter shall hereby be executed by a majority of the City Council of the City of Long Beach and shall constitute an official communication of the City of Long Beach City Council. The Acting City Manager is hereby directed to transmit the letter dated October 11, 2019, forthwith, to Chief Examiner Ira McCracken of the Office of the New York State Comptroller.



CITY OF LONG BEACH

1 WEST CHESTER STREET
LONG BEACH, N.Y. 11561
(516) 431-1001
FAX: (516) 431-1389

October 11, 2019

Ira McCracken
Chief Examiner
Office of the New York State Comptroller

Mr. McCracken:

This is a response to your letter dated October 7, 2019, in which you highlight and quote a number of prior communications, including:

1. The October 1 letter from Council President Moore, Vice President Bendo and member Mandel stating that "The draft audit response prepared by Mr. Capozzolo and submitted by Mr. Kalnitsky (the "Capozzolo Response") is not approved by the City Council."
2. The email of October 3 from Council President Moore, Vice President Bendo and member Mandel stating that "the Council has not endorsed the Capozzolo response."

You then ask that OSC be advised "by October 11, 2019, whether the City, through its governing body, formally rescinds the Capozzolo Response as the City's official response." You then state that "Upon receipt of such rescindment, OSC will extend the City's time to provide an official response to the Report, until November 11, 2019, six weeks beyond the original September 30, 2019 response date."

Please be advised that consistent with the prior communications, the Council rescinds the Capozzolo Response.

Thank you for your courtesies in this matter.

Very truly yours,

John Bendo, Vice President
Scott Mandel, Member



ROBERT M. AGOSTISI
CORPORATION COUNSEL

ASSISTANT
CORPORATION COUNSELS

CITY OF LONG BEACH

1 WEST CHESTER STREET
LONG BEACH, NEW YORK 11561
(516) 431-1003
FAX: (516) 431-1016

RICHARD A. BERRIOS
MEGAN CONGER
CHARLES M. GEIGER
GREGORY KALNITSKY
MATTHEW A. MILLER

September 23, 2019

Via Electronic Mail (imccracken@osc.state.ny.us)

Ira McCracken
Chief Examiner
Office of the New York State Comptroller
Hauppauge Regional Office
NYS Office Building
250 Veterans Memorial Highway
Room 3A10
Hauppauge, New York 11788-5533

Re: Response to Report of Examination Number 2019M-68

Chief Examiner McCracken:

Enclosed herein, please find the City of Long Beach's ("City") official response to Report of Examination, Examination Number 2019M-68 (the "Report"), issued by the Office of the New York State Comptroller.

The City Manager has recused himself from providing a response to the Report, has taken no part in its compilation, and designated the undersigned to coordinate a response in his stead. The City has retained outside counsel, Mr. Anthony Capozzolo, Esq., of the law firm of Lewis Baach Kaufmann Middlemiss, PLLC, to prepare a response to the Report. For purposes of transparency, I assisted Mr. Capozzolo in preparing the response to the Report.

Additionally, while the enclosed document constitutes the City's official response to the Report, it does not constitute any individual employee's response nor any City entity's response, including the City Council of the City of Long Beach, whose rights are expressly reserved and not bound by the City's official response.

Please do not hesitate to contact the undersigned should you have any questions or require any additional information.

Regards,

A handwritten signature in black ink, appearing to read 'Gregory Kalnitsky', with a stylized flourish at the end.

Gregory Kalnitsky
Assistant Corporation Counsel



**Lewis
Baach
Kaufmann
Middlemiss**
PLLC

September 23, 2019

Via Electronic Mail (imccracken@osc.state.ny.us)

Ira McCracken
Chief Examiner
Office of the New York State Comptroller
Hauppauge Regional Office
NYS Office Building
250 Veterans Memorial Highway
Room 3A10
Hauppauge, New York 11788-5533

Re: Response to Report of Examination

Chief Examiner McCracken:

Please consider this letter as a response by the City of Long Beach (the “City”) to a Report of Examination (the “Report”) provided to the City of Long Beach, Examination Number 2019M-68 by the Office of the New York State Comptroller (“Comptroller” or “Office”).¹

Initially, the City of Long Beach would like to thank you and your staff for conducting itself in a professional manner regardless of any points made in this response with respect to certain factual findings or recommendations expressed in your Report.

I. Overview / Executive Summary

To begin, the City of Long Beach welcomes the key recommendation by the Office that the City amend “the City Code to clarify how the City intends to compensate officers and employees for unused leave accruals subject to the City Code.” The City agrees that the current state of the Personnel Code has led to confusion and to the circumstances giving rise to the examination conducted by the Office. Furthermore, the lack of clarity in the Personnel Code prevented the City from taking more fiscally responsible measures with union, exempt and other employees with regard to payments out of employee leave accruals.

The City agrees that by amending the Personnel Code, such amendments can clarify the circumstances in which the City can provide certain benefits to its exempt employees and will

¹ The foregoing constitutes the City of Long Beach’s response and not any individual employee’s response nor any City entity’s response, including the City Council of the City of Long Beach, whose rights are expressly reserved and not bound by this document.

provide better transparency, which in turn can increase the trust City residents have in its own government in addition to providing increased financial stability to the City.

The City understands that the Report's second of two key recommendations by your office, that the City seek recovery of any separation or draw down payments that are "inconsistent with the City Code or any other applicable laws," must be carefully analyzed by the City and its legal counsel to determine the viability and the extent to which the City can recoup past separation or draw down payments to union or exempt employees.

While the Report appears to have a limited scope, the City will have to review all separation and draw down payments in order to treat all of its current and past City employees fairly and consistently. And the City will have to conduct an extensive legal analysis of the viability of pursuing the recovery of separation and draw down payments because, understandably, the Report does not include a legal analysis of whether the City would likely be successful in attempting to recover any particular payments. The City must conduct such a review to determine whether spending City resources to recover such payments would be cost efficient or successful. Notwithstanding overcoming various legal hurdles in recovering separation and draw down payments, explained more fully below, the City will have to contemplate legal expenses and fees incurred in connection therewith as well as whether the subjects of those proceedings are sufficiently solvent such that a judgment can be collected.

The Office's acknowledgement in one of its two key recommendations of the Report that the Personnel Code needs revision because of a lack of "clarity" suggests that attempts by the City to prove that such payments were "inconsistent" with the City's Personnel Code may be a fool's errand that could lead to expensive and possibly unproductive litigation at best. At worst, such efforts would likely constitute a further waste of financial resources that outstrip any limited potential benefit.

Finally, we wish to identify a number of factual circumstances and legal analyses that the Report does not address that might materially affect the factual findings of the Report and the ability of the City to seek recovery of any payments.

II. Additional Information Not Included in the Report

We provide the following list of key omissions in the Report which may affect certain conclusions or recommendations made in the Report.

1. Background to Draw Down and Separation Payments and the Personnel Code

The Personnel Code was adopted in 1997 to provide protection to exempt employees who were not otherwise covered by a union contract with respect to separation payments of accrual banks including vacation and sick leave accruals. The Personnel Code provisions with respect to

vacation and sick leave accruals were passed at the same time but are worded in completely different language.

For vacation pay, the Personnel Code provides that in “no event will an employee be entitled to cash equivalent of more than fifty (50) vacation days at the time of his/her termination.” Personnel Code §19-19(I). Each vacation day is paid out at 100 percent. The same provision explicitly grants the City Council the authority to permit an exempt employee to carry over more than 50 days of vacation from one year to the next.²

The sick leave accrual provision in the same section of the Personnel Code as the vacation pay provision is worded quite differently. The provision provides that an exempt employee is “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.” Personnel Code §19-19(B).

Notably, unlike the vacation accrual pay cap provision, there is no explicit limit on the cash payout permitted for sick leave accruals. And the same City Council that put the Personnel Code into effect in 1997 also prohibited exempt employees from earning compensatory time or terminal leave. Personnel Code §§19-21 and 19-22. So it is significant that in creating the Personnel Code, the City Council did not cap sick leave payments to exempt employees in a similar fashion to vacation pay accruals.

2. Additional Exempt Accrual Payments Not Included in the Report

A. Additional Exempt Draw Down Payouts

The Report appears to omit several additional exempt employees who received sick leave accrual draw down payouts from the City.

In the interest of completeness and transparency we provide the following summary of those additional draw down payouts:

² The vacation pay provision of the Personnel Code has been interpreted by the City’s Corporation Counsel, pursuant to a legal memorandum dated October 12, 2000 (and previously provided to the Office), as permitting an employee to carry over up to 50 accrued vacation days each year while continuing to accrue up to an additional twenty-five days’ vacation time in any given calendar year. At the conclusion of the calendar year, any time in excess of 50 days must be transferred to the employee’s sick leave accrual bank.

Title	Year	Accrual Type	Questionable Hours	Amount
Police Commissioner	2017	sick	463.29	51,992.67
Director of Econ Development and Planning	2017	sick	483.43	25,740.86
Executive Assistant to City Manager	2017	sick	235.74	8,511.68
Deputy City Manager	2017	sick	564.58	35,411.53
Grant Coordinator	2016	sick	22.62	812.50
Corporation Counsel	2014	sick	160.00	10,429.36
Comptroller	2011	vacation	100.00	6,256.68
Secretary To The Zoning Board Of Appeals	2011	vacation	40.00	1,174.20
Secretary To The Zoning Board Of Appeals	2011	vacation	40.00	1,174.20
Comptroller	2010	vacation	80.00	4,812.83
Building Commissioner	2010	vacation	40.00	1,740.66
Assistant Corporation Counsel	2009	vacation	196.00	8,955.77
Secretary To The Zoning Board Of Appeals	2009	vacation	80.00	2,258.09
Corporation Counsel	2008	vacation	200.00	11,758.62
Community Development Director	2008	vacation	80.00	2,681.99
Assistant Corporation Counsel	2008	vacation	24.000	10,646.83
Commissioner of Public Works	2008	vacation	80.00	4,948.98
Secretary To The Zoning Board Of Appeals	2008	vacation	80.00	1,724.14
Total				\$191,031.59

The preceding chart indicates an additional amount of questionable draw down payments of \$191,031.59.

B. Additional Exempt Separation Payment of Accruals

In addition to the above-described draw down payments, the following additional exempt separation payments were made in which the employees received accrual payments beyond cap on vacation accrual payments in the Personnel Code.

Title	Year	Type of Accrual	Questionable Hours	Amount
Secretary to the City Manager	2017	vacation	50.00	1,688.87
City Manager	2011	vacation	600.00	15,929.50
DPW Commissioner	2008	vacation	585.85	11,497.09
Director of Public Relations	2004	vacation	616.00	4,239.22
Director of Operations	2002	vacation	648.00	12,192.30
City Manager	2000	vacation	1880.00	74,663.48
Total				\$120,210.46

The preceding chart indicates an additional amount of questionable separation payments of \$120,210.46.

Our review has also identified a number of employees who separated from City employment and received payouts in excess of even what the retirement incentive offered. For example, the former Public Relations Service Assistant received an inexplicable severance pay in 2012 upon separating from the City during the change of administrations.

3. Union Draw Down and Separation Payouts that are Inconsistent with PBA/CSEA Contracts and/or the Personnel Code Significantly Exceed Exempt Payouts.

A. Union Draw Down Payments

The following are believed to be a complete accounting of additional draw down payments, which were received by union employees, since 2008:

Employee	Date of Check	Type of Accrual	Questionable Hours	Amount
Payroll Supervisor	1/12/2018	vacation	80.00	2,670.67
Asst. Supervisor of Street Maintenance	1/26/2018	comp	150.00	3,954.42
Deputy City Clerk	12/1/2017	sick	316.62	10,437.73
Network Specialist	12/15/2017	vacation	51.00	2,692.38
Asst. Superintendent of Water	12/15/2017	comp	80.00	3,259.59
Senior Admin. Aide of Beach Maintenance	8/25/2017	comp	80.00	2,376.00
Legal Stenographer	12/15/2017	comp	220.00	8,210.53
Payroll Supervisor	10/25/2017	vacation	80.00	2,670.67

Supervisor of Water Billing and Collection	9/23/2016	accrued lag	160.16	7,266.06
Network Specialist	12/22/2016	vacation	161.00	8,499.46
Asst. Superintendent of Water	3/11/2016	comp	80.00	3,180.98
Tax Assessor	9/30/2016	accrued lag	160.16	8,178.12
Payroll Supervisor	12/22/2016	vacation	80.00	2,406.91
Payroll Supervisor	1/29/2016	vacation	80.00	2,281.78
Bus Dispatcher	4/24/2015	comp	360.30	13,894.61
Paramedic	7/31/2015	comp	31.50	627.59
Payroll Supervisor	3/24/2015	vacation	80.00	2,179.18
Superintendent of Water Maintenance	4/24/2015	comp	132.75	6,880.64
Laborer	9/26/2014	comp	50.00	1,188.15
Fire Dispatcher	1/3/2014	comp	62.00	1,372.04
Program Director	6/28/2013	comp	25.39.00	505.59
Public Works Administrative Aide	7/24/2013	comp	30.00	904.67
Employee Benefits Representative	10/25/2013	comp	53.67	1,738.39
Laborer	10/1/2013	comp	68.00	1,452.86
Heavy Equipment Operator	10/1/2013	comp	51.50	1,229.92
Firefighter	9/11/2013	comp	188.36	10,000.37
Laborer	10/1/2013	comp	59.00	1,229.21
Heavy Equipment Operator	10/1/2013	comp	67.00	1,725.00
Plant Operator	6/28/2013	comp	259.99	5,744.32
Payroll Supervisor	10/1/2013	comp	40.00	956.46
Bus Driver	9/27/2013	comp	92.00	2,610.42
Supervisor Of Beach Maintenance	9/28/2012	comp	380.51	13,278.47
Supervisor Of Beach Maintenance	8/31/2012	comp	513.51	17,919.70
Maintenance Carpenter	9/28/2012	comp	111.76	3,827.44
Maintenance Carpenter	8/31/2012	comp	226.76	7,765.82
Chief Plant Operator	9/28/2012	comp	862.00	39,012.31

Chief Plant Operator	8/31/2012	comp	1023.00	46,298.83
Sanitation Supervisor	12/23/2011	vacation	40.00	1,426.84
Police Lieutenant	7/22/2011	vacation	197.75	15,003.87
Public Works Administrative Aide	9/16/2011	vacation	40.00	912.55
Public Works Administrative Aide	4/1/2011	vacation	80.00	1,588.89
Superintendent Of Water Maintenance	12/23/2011	vacation	40.00	1,846.00
Employee Benefits Representative	3/18/2011	comp	38.00	1,106.24
Heavy Equipment Operator	12/23/2011	comp	40.00	898.77
Deputy Executive Director Of Youth Bureau	12/23/2011	comp	286.00	9,058.94
Police Lieutenant	7/22/2011	vacation	193.50	15,015.91
Police Lieutenant	7/22/2011	vacation	197.25	15,003.27
Principal Clerk	3/18/2011	vacation	40.00	906.51
Administrative Aide	4/1/2011	comp	80.00	1,644.78
Police Lieutenant	7/22/2011	vacation	195.00	15,016.70
Legal Stenographer	12/23/2011	vacation	40.00	1,054.74
Bus Driver	2/4/2011	comp	80.00	2,040.26
Executive Director Of Youth Bureau	12/23/2011	vacation	200.00	10,233.46
Recreation Leader	12/23/2011	vacation	40.00	1,153.47
Building Superintendent	12/23/2011	comp	80.00	3,274.76
Principal Account Clerk	12/23/2011	vacation	40.00	1,492.15
Cleaner	4/1/2011	vacation	40.00	787.74
Cleaner	2/4/2011	comp	80.00	1,575.48
Water Distribution Worker	8/5/2011	comp	103.00	3,069.68
Assistant Chief Plant Operator	9/16/2011	vacation	40.00	1,608.78
Sanitation Supervisor	4/15/2011	vacation	40.00	1,371.96
Payroll Supervisor	12/23/2011	vacation	40.00	925.14
Payroll Supervisor	6/13/2011	vacation	40.00	814.72

Police Lieutenant	7/22/2011	vacation	188.00	15,016.16
Chief Plant Operator	7/8/2011	vacation	40.00	1,593.94
Treasurer	7/9/2010	terminal	800.00	27,579.84
Firefighter	8/20/2010	comp	103.07	4,999.89
Public Works Administrative Aide	12/23/2010	vacation	40.00	794.44
Public Works Administrative Aide	8/6/2010	vacation	80.00	1,575.48
Superintendent Of Water Maintenance	3/19/2010	comp	80.00	2,997.48
Employee Benefits Representative	11/24/2010	vacation	40.00	1,164.47
Director Of Garage Operations	12/23/2010	vacation	40.00	1,741.40
Maintenance Mechanic	12/10/2010	vacation	40.00	924.27
Superintendent Of Water Maintenance	9/3/2010	vacation	80.00	3,482.80
Chief Plant Operator	9/3/2010	vacation	80.00	3,631.41
Chief Plant Operator	10/1/2010	vacation	80.00	3,631.41
Chief Plant Operator	3/19/2010	vacation	40.00	1,763.36
Plant Operator	12/23/2010	vacation	40.00	1,081.51
Police Lieutenant	7/23/2010	comp	240.00	18,578.95
Personnel Clerk	1/22/2010	vacation	80.00	1,635.22
Mechanic	8/6/2010	vacation	40.00	784.36
Assistant Supervisor (Water Transmission)	8/6/2010	comp	148.00	4,273.09
Police Lieutenant	7/23/2010	vacation	200.00	15,174.58
Bus Driver	2/5/2010	vacation	80.00	1,779.74
Laborer	5/28/2010	comp	40.00	691.28
Water Distribution Worker	8/6/2010	comp	120.50	3,349.83
Police Lieutenant	7/23/2010	personal	175.00	13,443.40
Executive Director Of Youth Bureau	10/29/2010	vacation	136.00	6,691.10
Police Officer	7/23/2010	comp	190.25	10,277.06
Principal Account Clerk	7/23/2010	vacation	160.00	5,741.90
Water Meter Reader	8/20/2010	vacation	40.00	1,064.15

Supervisor Of Recreation Maintenance	9/16/2010	comp	108.00	3,321.79
Supervisor Of Recreation Maintenance	9/3/2010	comp	116.00	3,567.85
Payroll Supervisor	11/24/2010	vacation	40.00	814.72
Payroll Supervisor	2/19/2010	vacation	40.00	776.36
Police Lieutenant	9/3/2010	vacation	145.05	11,585.61
Police Lieutenant	7/23/2010	vacation	200.00	15,936.78
Maintenance Worker	5/13/2010	vacation	240.00	4,731.17
Police Officer	8/7/2009	vacation	80.00	2,159.17
Director of Transportation	12/24/2009	vacation	50.00	1,284.13
Clerk	11/25/2009	comp	40.00	1,381.06
Superintendent Of Water Maintenance	7/24/2009	comp	80.00	2,986.96
Superintendent Of Water Maintenance	11/25/2009	vacation	40.00	1,507.36
Public Works Administrative Aide	1/9/2009	vacation	80.00	1,485.04
Fire Lieutenant	12/24/2009	comp	207.00	10,041.01
Police Officer	10/16/2009	various	477.00	26,537.94
Water Distribution Worker	12/24/2009	vacation	40.00	960.27
Laborer	3/26/2009	various	130.00	2,352.66
Legal Stenographer	10/30/2009	vacation	80.00	2,193.77
Director Of Garage Operations	12/24/2009	Vacation	40.00	1,633.70
Superintendent Of Water Maintenance	11/25/2009	Vacation	80.00	3,382.39
Chief Plant Operator	10/30/2009	Vacation	80.00	3,526.71
Firefighter	2/23/2009	comp	180.00	6,119.86
Network Specialist	12/11/2009	vacation	80.00	2,911.62
Supervisor of Sewer Maintenance	11/25/2009	vacation	80.00	3,267.39
Police Lieutenant	7/24/2009	various	318.00	21,828.35
Plant Operator	5/4/2009	vacation	40.00	722.67
Mechanic	5/18/2009	vacation	80.00	1,409.54

Assistant Supervisor (Water Transmission)	8/21/2009	vacation	80.00	2,107.96
Police Lieutenant	8/21/2009	vacation	264.25	19,999.39
Community Development Director	2/23/2009	vacation	120.00	4,022.99
Firefighter	10/30/2009	comp	214.50	10,201.30
Water Distribution Worker	10/2/2009	vacation	80.00	2,195.78
Police Officer	5/1/2009	various	500.00	32,376.50
Executive Director Of Youth Bureau	12/11/2009	vacation	80.00	3,935.94
Recreation Leader	1/9/2009	vacation	80.00	1,959.00
Police Lieutenant	8/7/2009	personal	277.00	20,807.05
Water Meter Reader	9/4/2009	vacation	40.00	1,033.68
Comptroller	8/21/2009	vacation	80.00	4,812.83
Employee #1 Title Undetermined	10/16/2009	vacation	112.00	2,951.14
Beach Maintenance Superintendent	5/1/2009	comp	240.00	8,688.48
Program Director	10/17/2008	vacation	80.00	1,487.16
Firefighter	5/2/2008	comp	218.75	10,002.83
Police Lieutenant	3/7/2008	vacation	265.58	19,999.53
Public Works Administrative Aide	9/19/2008	vacation	80.00	1,485.04
Bus Dispatcher	12/12/2008	vacation	80.00	2,497.42
Employee #2 Title Undetermined	12/26/2008	vacation	60.00	3,510.88
Employee #2 Title Undetermined	9/5/2008	vacation	260.42	15,982.68
Superintendent Of Water Maintenance	12/26/2008	vacation	80.00	3,265.78
Chief Plant Operator	12/26/2008	vacation	40.00	1,632.89
Chief Plant Operator	6/27/2008	vacation	80.00	3,155.93
Police Officer	3/7/2008	vacation	400.00	30,879.24
Supervisor of Sewer Maintenance	12/12/2008	vacation	80.00	3,042.92
Police Lieutenant	3/7/2008	personal	287.98	19,999.87
Assistant Supervisor (Water Transmission)	10/31/2008	vacation	80.00	2,047.10

Police Officer	3/20/2008	comp	250.00	15,796.13
Firefighter	5/2/2008	comp	218.75	10,002.83
Police Officer	11/26/2008	comp	200.00	11,198.56
Bus Driver	9/19/2008	comp	120.00	2,489.66
Executive Director Of Youth Bureau	12/26/2008	vacation	80.00	3,821.30
Firefighter	5/2/2008	comp	204.00	10,009.75
Clerk	3/7/2008	misc.	N/A	11,500.00
Comptroller	10/3/2008	vacation	172.00	10,046.21
Beach Maintenance Superintendent	12/26/2008	vacation	120.00	4,344.24
Beach Maintenance Superintendent	9/5/2008	comp	241.00	8,724.68
Total				\$975,161.97

The preceding chart indicates an additional amount of “questionable” draw down payments to 168 union employees totaling \$975,161.97. It should be noted that, while the Report highlights payments made at 100% of sick leave accruals to certain employees, receiving vacation drawdowns is its functional equivalent. For example, if an employee has accrued vacation leave that is approaching the maximum amount of vacation time that employee can carry over, and then that employee proceeds to take a drawdown of vacation time which would otherwise be moved into their sick banks, that employee is receiving the equivalent of a drawdown of sick time paid at the 100% rate otherwise afforded to vacation time. Stated more succinctly, if vacation time is paid out before it would otherwise be moved to the sick bank, the vacation draw down is the functional equivalent of being paid 100% of sick leave accruals.

B. Additional Questionable Separation Payouts to Employees Covered by the CSEA Contract.

The following separation payments to employees covered by the CSEA contract were identified which show amounts in excess of the contract provisions regarding vacation accruals. The CSEA contract provisions applicable to the union employees identified below limited vacation payouts at separation pay to 400 hours:

Title	Year of Payout	Type of Accrual	Questionable Hours	Amount
Maintenance Worker	2011	vacation	742.15	7,221.04
Superintendent of Water Maintenance	2010	vacation	600.00	8,458.00
Chief Plant Operator	2010	vacation	589.50	8,012.02

Recreation Aide	2010	vacation	600.00	5,052.00
Supervisor of Sewer Maintenance	2010	vacation	600.00	8,456.08
Parking Enforcement Officer	2010	vacation	573.22	4,898.13
Maintenance Worker	2010	vacation	481.23	1,848.70
Sanitation Worker	2010	vacation	600.00	5,168.38
Cleaner	2010	vacation	527.00	2,241.68
Plumber	2010	vacation	600.00	5,958.00
Animal Warden	2009	vacation	424.06	753.54
Building Inspector	2009	vacation	516.74	4,386.68
Building Inspector	2009	vacation	600.00	7,515.30
Resource Conservation Tech	2009	vacation	592.50	6,979.18
Purchasing Agent	2008	vacation	609.85	7,766.55
Heavy Equipment Operator	2007	vacation	600.00	4,774.60
Working Supervisor	2007	vacation	438.25	941.87
Payroll Clerk	2007	vacation	692.00	6,408.82
Purchasing Agent	2006	vacation	407.07	269.53
Water Plant Operator	2006	vacation	402.62	46.27
Bus Driver	2006	vacation	483.38	1,992.92
Senior Plant Operator	2006	vacation	600.00	5,298.08
Plant Operator	2006	vacation	404.00	72.68
Heavy Equipment Operator	2005	vacation	418.84	427.21
Zoning Inspector	2005	vacation	650.75	6,102.48
Assistant Supervisor	2005	vacation	674.00	6,962.07
Working Supervisor	2005	vacation	669.00	6,271.65
Clerk	2005	vacation	410.00	137.57
Bus Dispatcher	2004	vacation	474.00	1,876.19
Municipal Personnel Tech	2004	vacation	633.00	5,407.93
Tax Assessor	2004	vacation	565.00	5,268.10
Superintendent	2004	vacation	600.00	7,847.26
Animal Warden	2004	vacation	642.00	6,135.64
Administrative Aide	2004	vacation	628.00	4,722.43
Stenographer	2004	vacation	480.00	2,224.14
Photo Technician	2004	vacation	712.00	7,274.19
Director of IT	2004	vacation	648.00	7,251.27

Assistant Superintendent	2004	vacation	512.00	3,460.42
Chief Mechanic	2004	vacation	516.00	3,186.43
Bus Driver	2004	vacation	440.00	869.77
Superintendent of Public Works	2004	vacation	558.00	6,685.07
Director of Operations	2004	vacation	600.00	9,533.40
Building Superintendent	2004	vacation	508.00	3,689.34
Comptroller	2003	vacation	469.00	3,899.36
Heavy Duty Auto Mechanic	2003	vacation	441.00	924.14
Maintenance Worker	2003	vacation	539.00	2,743.51
Principal Clerk	2003	vacation	607.00	4,859.39
Sanitation Worker	2002	vacation	432.00	707.18
Working Supervisor	2002	vacation	518.00	2,595.55
Payroll Supervisor	2002	vacation	647.00	5,994.29
Senior Typist	2002	vacation	625.00	4,785.00
Supervisor	2002	vacation	455.00	1,487.16
Assistant Superintendent	2002	vacation	569.50	5,993.30
Traffic Equipment Maintenance Worker	2002	vacation	417.00	373.93
Account Clerk	2002	vacation	413.00	262.49
Parking Enforcement Officer	2002	vacation	463.00	1,301.84
Water Plant Operator	2001	vacation	421.00	431.12
Working Supervisor	2001	vacation	600.00	4,650.64
Maintenance Worker	2001	vacation	704.00	5,998.53
Administrative Aide	2001	vacation	442.00	730.88
Garage Attendant	2001	vacation	499.33	1,849.95
Assistant Superintendent	2000	vacation	644.00	7,141.34
Total				\$375,103.79

The preceding chart indicates an additional amount of “questionable” separation payments of \$375,103.79.

C. Questionable PBA Separation Payouts of More than \$1.2 Million

The following separation payments appear to include excessive payments of vacation leave in excess of the 400 hour limit in the PBA voluntary interest arbitration award applicable thereto:

Title	Effective Date	Accrual Type	Questionable Hours ³	Amount
Lieutenant	1/31/19	vacation	698.31	64,817.00
Lieutenant	10/31/2018	vacation	465.10	44,517.00
Detective	7/3/2018	vacation	383.37	31,216.29
Lieutenant	7/15/2015	vacation	147.27	10,331.53
Police Officer	5/29/2015	vacation	293.71	21,724.34
Sergeant	5/20/2015	vacation	327.61	26,714.79
Lieutenant	2/11/2015	vacation	1,130.17	84,088.17
Sergeant	9/22/2014	vacation	392.07	31,892.05
Police Officer	2/13/2014	vacation	312.22	19,708.33
Lieutenant	9/27/2013	vacation	316.90	22,636.34
Detective	8/29/2013	vacation	23.68	1,684.03
Lieutenant	8/21/2013	vacation	78.30	5,552.47
Police Officer	6/4/2013	vacation	139.08	9,258.72
Det. Sergeant	4/27/2012	vacation	669.15	47,199.97
Police Lieutenant	2/28/2012	vacation	321.94	23,632.57
Deputy Inspector Police Lieutenant	1/2/2012	vacation	214.30	15,005.11
Acting Police Commissioner Police Lieutenant	11/29/2011	vacation	1085.01	92,450.54
Detective	7/6/2011	vacation	705.82	46,636.30
Police Officer	5/27/2009	vacation	708.42	39,005.94
Lieutenant	5/26/2008	vacation	361.91	27,032.94
Police Lieutenant	12/5/2008	vacation	845.92	63,677.89
Police Officer	9/4/2008	vacation	438.84	23,402.10
Det. Lieutenant	7/31/2008	vacation	900.88	70,053.27
Police Sergeant	6/28/2008	vacation	35.87	2,247.24
Detective	6/4/2008	vacation	153.87	9,423.31
Detective	2/28/2008	vacation	664.56	42,751.63
Lieutenant	9/10/2007	vacation	341.59	25,337.55
Police Officer	7/30/2007	vacation	177.048	9,514.46
Police Officer	2/21/2007	vacation	719.73	37,499.94

³³ For separation payments the “questionable hours” listed herein are the hours that exceed the cap applicable to the employee, in this case, the 400 hour vacation cap pursuant to the PBA voluntary interest arbitration award. So in the first row of this chart, the questionable hours are 698.1. This employee’s separation payment, in fact, totaled a payout of 1098.1 hours of vacation accrual.

Police Officer	11/15/2006	vacation	435.74	22,176.82
Police Officer	7/18/2006	vacation	587.05	30,772.57
Police Officer	7/18/2005	vacation	384.90	19,549.68
Police Officer	7/6/2005	vacation	17.08	855.24
Commanding Officer	11/2/2004	vacation	40.00	1,104.98
Police Officer	1/17/2004	vacation	76.57	3,324.64
Detective	12/22/2003	vacation	638.00	32,518.45
Detective	9/18/2003	vacation	114.81	5,296.73
Police Lieutenant	9/5/2003	vacation	636.63	38,991.95
Police Sergeant	1/31/2003	vacation	94.62	4,692.86
Detective	8/31/2002	vacation	513.00	27,479.53
Detective	8/15/2002	vacation	543.91	28,689.93
Police Lieutenant	8/10/2002	vacation	407.44	23,914.58
Police Sergeant	7/6/2002	vacation	334.00	18,294.79
Detective	7/5/2002	vacation	359.5	18,807.74
Police Sergeant	7/5/2002	vacation	907.26	47,855.10
Police Commissioner	1/17/2002	vacation	5.00	317.62
Police Commissioner	6/1/2000	vacation	642.62	37,276.09
Total				\$1,310,931.12

This analysis suggests an overpayment of vacation hours inconsistent with the PBA contract of over \$1.3 million.

D. Questionable Firefighter Separation Payouts.

An analysis of firefighter separation payouts occurring between 2001 and 2013 identified nine firefighter retirements occurring during 2002 to 2013. During this time period, firefighters and lieutenant firefighters were restricted to a cap of 400 hours on vacation accrual payouts. The following was observed:

Title	Effective Date of Retirement	Accrual Type	Questionable Hours	Amount
Firefighter	4/30/2019	vacation	7.74	410.93
Lieutenant Medic	11/7/2013	vacation	200.57	12,381.63
Firefighter	10/11/2012	vacation	332.85	17,671.61
Fire Lieutenant	3/17/2011	vacation	23.38	1,440.72
Firefighter	7/30/2008	vacation	202.00	6,488.46

Fire Lieutenant	5/18/2006	vacation	932.30	36,814.30
Firefighter	11/30/2013	vacation	1020.00	31,801.46
Firefighter	2/5/2003	vacation	1336.00	40,025.10
Fire Lieutenant	4/8/2002	vacation	219.00	7,406.82
Total				\$154,441.03

The preceding chart indicates an overpayment on vacation hours for firefighters according to their contract of \$154,441.03.

III. Legal Interpretation of the Personnel Code is a Critical Step to Determining Future Actions to be Taken by the City

A. Role of Retirement Incentives by the City Council and City Manager in 2012, 2014 and 2016.

The Report makes only a passing reference to the retirement incentive offers that numerous City employees accepted since 2012, which offered the option of exceeding the 30% sick leave entitlement or exceeding the terminal leave entitlements.

Consistent with the Personnel Code, the City offered retirement incentives to union and exempt employees several times since 2012. In each of the incentives, employees were offered to be paid from 50% to 65% of sick leave accruals, which was well in excess of the 30% sick leave entitlement in the Personnel Code. Additionally, since 2012, each retirement incentive offered ten days per year of employment of terminal pay instead of the five days per year of employment of terminal pay codified in the CSEA contract. And in each case, the Personnel Code and CSEA contracts were not modified or amended to provide for the excess accrual payouts contained in the incentives. Each of the incentives were well-advertised and known throughout the city government. No legislative actions were taken after any of the retirement incentives since 2012 to amend the Personnel Code with respect to vacation or sick leave accrual payouts.

For these retirement incentives, the costs were to be spread out over three years, giving the City the financial flexibility to cover those costs and anticipate them in a responsible manner consistent with sound financial planning rather than as an unexpected balloon payment in the single year that a city employee retired. Not infrequently, the total separation payment to a single City employee could reach amounts well in excess of three hundred thousand dollars. As a result it seems eminently reasonable, if not necessary, for city officials to take fiscal planning measures that would diffuse the economic impact of such retirements.

B. City Council Actions Can Affect the Interpretation of the Personnel Code

Having the City Council amend the Personnel Code and/or union contracts to explicitly permit the practice of draw down payments (as the Report recommends) is not a difficult task moving

forward. Unfortunately, the Report puts the proverbial cart before the horse by recommending that the City seek repayment from only a certain category of employees from an incomplete list of individuals who were paid in excess of 30 percent of their sick leave accruals and other questionable payouts without: 1) providing guidance as to the appropriate legal interpretation of the Personnel Code; and 2) appreciation for the potential risks of legal action that could require repayment from all city employees who received in excess of statutory or contractual leave entitlements, including those who received payouts under the retirement incentives authorized through the City Council in 2012 and later incentives offered by the City Manager without authorization from the City Council.

We understand that in the normal course of a Report of Examination by the Office that recommendations are sometimes made to recover payments made in transgression of ordinances or other laws. Unlike most cases, in this matter there are several legal issues that must be addressed before recovery of funds can be attempted. Here, the very premise of whether such payments were authorized renders the Office's recommendation that the City recover such payments "that are inconsistent with the City Code or any applicable laws" somewhat unclear because the recommendation begs the question of whether the payments were inconsistent with the Personnel Code or other laws and/or contracts.

To be clear, much of what actions the City may take to recover these funds will depend on how a court or labor arbitrator may interpret municipal code provisions, contractual clauses, and intervening City Council actions (or lack thereof) for which there is no precedent for how such terms and actions will be interpreted.

First, there are real and substantial legal arguments that the Report does not address that could well be raised contrary to the Report's assertion that payments of sick leave in excess of 30 percent are inconsistent with the Personnel Code. Of course, the different statutory language used in the Personnel Code for sick leave and vacation accruals suggest that one possible interpretation is that the Personnel Code created a minimum entitlement for sick leave accruals while creating a maximum, or a cap, on separation payouts for vacation accruals for exempt employees. Such interpretation would leave discretion and flexibility to offer sick leave accrual payouts in excess of the 30 percent entitlement, in a manner consistent with the retirement incentives discussed above.

When two similar provisions in law are drafted simultaneously and the statutory language is different in those provisions, normal statutory construction presumes that such different language was intentional. For example, "Pursuant to the maxim of statutory construction expression unius est exclusio alterius, 'where a law expressly describes a particular act, thing, or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded.'" *Matter of Town of Eastchester v. New York State Bd. of Real Prop. Servs.*, 23 A.D.3d 484, 485 (2nd Dept. 2005) (citing McKinney's Cons Laws of NY, Book 1, Statutes § 240, at 412-413). Here, where the Personnel Code does not include any cap

on sick leave accruals where the Personnel Code provided an explicit cap on vacation accruals, and both provisions were passed at the same time and in the same section of law in 1997, it leaves the presumption that such differences were intentional.

Thus, there is a real and unresolved question as to whether a court, if asked to determine the legality of the questionable sick leave accrual payments, would find that the Personnel Code placed a cap on vacation payouts to 50 days but only established a minimum entitlement to 30 percent of sick leave accruals. If so, litigation pursuing recovery of such payouts may be costly and ineffective rendering a key recommendation of the Report impossible to achieve.

IV. There Is No Implied Repeal of the 1997 Personnel Code.

The Report provides no guidance as to the legal significance of the City Council having approved separation payments that included sick leave accrual payouts in excess of 30 percent without amending the Personnel Code. Under the law, when a legislative body like the City Council acts in a way that appears to be inconsistent with other legislation, New York law presumes that such action was not intended to repeal the earlier statute. Thus, the “implied repeal” of a statute is specifically disfavored in New York.

Repeal or modification of a statute by implication is disfavored (*Matter of Consolidated Edison Co. of N.Y. v Department of Envtl. Conservation*, 71 NY2d 186, 195, 519 NE2d 320, 524 NYS2d 409 [1988]).

‘Generally speaking, a statute is not deemed to repeal an earlier one without express words of repeal, unless the two are in such conflict that both cannot be given effect. If by any fair construction, a reasonable field of operation can be found for two statutes, that construction should be adopted’ (*People v Newman*, 32 NY2d 379, 390, 298 NE2d 651, 345 NYS2d 502 [1973] *cert denied* 414 US 1163, 94 S Ct 927, 39 L Ed 2d 116 [1974], quoting *Matter of Board of Educ. of City of N.Y. v Allen*, 6 NY2d 127, 141-142, 160 NE2d 60, 188 NYS2d 515 [1959]).

‘These principles apply with particular force to statutes relating to the same subject matter, which must be read together and applied harmoniously and consistently. Moreover, as to statutes enacted in a single legislative session, there is a presumption against implied repeal; the Legislature would hardly repeal a fresh enactment without doing so expressly’ (*Alweis v Evans*, 69 NY2d 199, 204-205, 505 NE2d 605, 513 NYS2d 95 [1987] [citations omitted]).

UMG Recs., Inc. v Escape Media Group, Inc., 107 A.D.3d 51, 57 (1st Dept. 2013).

Why is this important? Because any judicial body evaluating this history would necessarily attempt to read the Personnel Code and/or union contracts and the retirement incentives coextensively. In other words, a court would be constrained by this statutory presumption to attempt to find that both the Personnel Code's exempt employee entitlement to 30 percent sick leave accrual and the City Council's award of more than 30 percent of sick leave accrual were proper.

Notably, none of the retirement incentives sought to provide payouts of vacation accruals that exceeded the explicit cap contained in the Personnel Code. That further suggests that the City Council, by avoiding such a direct conflict with the Personnel Code, demonstrated an intent that the Personnel Code should be interpreted as permitting discretion to the City to provide sick leave accrual payouts in excess of 30 percent. And to be clear, there does not appear to be any legal significance between sick leave accrual payouts of 31 or 100 percent, or anything in between. Either the Personnel Code established a 30 percent cap on sick leave accruals or it did not.

V. Forbearance.

Beyond the identification of "questionable" payments, the Report did not determine whether any of the payments, or portions thereof, were obligated to be paid due to forbearance on the part of the employee at the request of the City through the employee's supervisors. For example, many employees were working during 2012, the year of Superstorm Sandy, and the years following the storm in which employees were required to work significant additional hours while at the same time, such employees also may not have taken vacation or other leave at the request of City supervisors.

There may be other examples of forbearance as well but it is clear that employees who do not use accruals due to forbearance at the direction of municipal employers are obligated to pay its employees in cash for excess accruals caused by such forbearance. *Gendalia v. Gioffre*, 594 N.Y.S.2d 322 (2d Dept. 1993) (complaint properly stated a cause of action where employees sought payment for accrued time where their supervisors allegedly caused them to refrain from taking leave).

VI. Other Legal Considerations

The Report appears to adopt an interpretation of the Personnel Code that a 30 percent cap was imposed without including any analysis of the prior City Council actions, including prior retirement incentives permitting payment of sick leave accruals in excess of 30 percent and terminal leave payouts that are inconsistent with the Personnel Code or other statutes and contracts. And the Report, while suggesting the City should seek repayment of excess sick leave

accruals (the largest category of questionable payouts identified in the Report) among others, there is a lack of accounting for the concomitant legal consequences of doing so and a corresponding lack of analysis of the likelihood of success in court and the associated costs with doing so.⁴

Seeking recovery from the limited number of employees identified in the Report may give rise to additional legal considerations. It is unclear if the Report recommends that the City seek recovery of “questionable” payments from the limited number of exempt employees identified in the Report, all exempt employees who may have received “questionable” payments, or the union employees who received “questionable” payments as well. Further, it is unclear if the City should seek recovery from employees who received “questionable” payments outside the scope of the audit where the City is aware of such payments.

If the City does not treat employees equally and selectively enforces the recovery of “questionable” payments, it could expose the City to additional liability. For example, exempt employees of the City have recently filed for union membership. Should the Office recommend that the City seek recovery of payouts only from exempt employees, it may raise claims of retaliation under federal civil rights laws such as 42 U.S.C. § 1983. *Vega v. Hempstead Union Free School District, et al.*, 801 F.3d 72 (2nd Cir. 2015).

New York State law also protects employees seeking to participate in lawful labor activities. Section 215 of the New York State Labor Law makes it illegal for employers to discriminate or retaliate against an employee for exercising any rights that are protected under Labor Law. If the employee wins, the court may order, among other things, payment of lost compensation, damages up to \$20,000 per employee, and payment of reasonable attorneys’ fees.⁵

⁴ This is not a speculative legal hypothetical. A legal matter coincidentally involving a former City Manager of the City of Long Beach is illustrative. See *Spiritis v. Vil. of Hempstead Community Dev. Agency*, 63 A.D.3d 907 (2d Dept. 2009). Prior to becoming City Manager of the City of Long Beach, Spiritis worked for the Village of Hempstead and received the same benefits as CSEA employees and, in addition thereto, was subject to compensation by virtue of a “Consulting Agreement.” Spiritis was permitted to carry over accrued time throughout his employment and, prior to his departure, was retroactively permitted to carry over accrued time including personal days, birthday days, and sick days. Additionally, Spiritis’s Consulting Agreement permitted him to work no more than 20 hours bi-weekly, which was regularly exceeded. This resulted in a cash liability in excess of \$500,000 which a new administration did not want to pay. Instead, the Village of Hempstead unilaterally withheld payment to Spiritis and Spiritis sued. The village believed that under the terms of his contract and other applicable law that his payment was excessive. The end result, however, was the Appellate Division affirming a judgment of \$519,095.29 with five years of interest at 9%, resulting in a total judgment of close to \$1,000,000. That was the consequence of seeking recovery of a *single* employee’s accruals – here the Office is recommending an action that would cause the City to recover payments to dozens of current and former employees of the City.

⁵ It is also unclear to what extent the recently passed New York State Pay Equity statute (effective October 8, 2019) will affect the City’s attempt to claw back funds paid to City employees or officers when prior officers received similar payouts for substantially similar work.

As in the case of any Report of Examination by the Comptroller's Office, we would agree with the principle that a municipality should make best efforts to comply with its recommendations. But by leaving unaddressed the most fundamental legal questions and omitting certain individuals and entire categories of employees who may have received "questionable" payments, certain recommendations are left unclear as to their viability because it is unlikely that they can be executed when considered in light of "the City Code or any other applicable laws," the condition the Report uses to qualify its recommendation to recover such funds.

We understand that the Report is a limited document in terms of legal analysis, as it purports to be a report of examination, or audit, of certain of the City's finances. That primary accounting function cannot, however, excuse the avoidance of necessary legal analysis that may affect the Report's factual findings but, more importantly, may affect the likelihood that the City can feasibly carry out the recommendations of the Report. And these are not new legal positions or issues raised for the first time in this letter, but matters that were raised with the Comptroller Office's staff in various interviews conducted by the Office during this examination.

For example, the Report quotes Corporation Counsel staff as explaining that the "City has 'necessarily' interpreted the 30 percent sick leave entitlement." This is unfortunate phrasing in that it appears to portray the Corporation Counsel staff as making this suggestion on its own without legal support. In fact, this explanation was rooted in the rule of statutory construction giving rise to a legal presumption, cited above, that raises a serious question as to whether union or exempt employees would be successful in resisting the City's attempt to claw back payouts that the Report recommends be recovered by the City.

We also assume that many, if not most, of the union and exempt employees that have received draw down or separation payments have used all or a portion of the "questionable" payouts. One can imagine how a court will view the City's attempt to recover a draw down payment used by an employee for funeral expenses or other important life matters.

VII. Draw Down Payments May Be Financially Responsible.

The Report does not provide a fulsome explanation or analysis of the City's practice of paying draw downs. The City does accept the recommendation of the Report that draw down payments, if they are to be done in the future,⁶ should be included in an amendment to the Personnel Code or any applicable labor contracts. As mentioned in the Report, draw down payments occurred where City employees had been permitted to be paid in cash for a portion of their accumulated leave banks prior to separation from City employment. First, of course, is that such payments are payments out of leave accruals that employees have, in fact, already earned. Second, such payments have been historically and overwhelmingly paid to union employees to assist with unexpected financial hardships such as medical costs or funeral travel costs.

⁶ It should be noted that in light of this Office's audit of separation and draw down payments, that in a memorandum from 2018, the Acting City Manager suspended the practice of draw down payments until further notice.

Such payments are often in the City's financial interest to be paid. First, they often can and have been allowed by the City when the City's finances were in a better position to support such payments.

Second, the payments in of themselves can save the City money over time. If an employee draws down his or her leave accruals, they are paid at the employee's current rate of pay. So it can be significantly less expensive to the City to pay an employee 10 hours of sick leave in a draw down payment years before an employee separates from City employment when their rate of pay would likely be considerably higher.

Recognizing that it would be preferable that in the future such draw down payments be explicitly provided for in the Personnel Code or ratified in union contracts is one thing, however, it is a material omission of the Report not to identify or to conduct an analysis of the cost savings to the City of having made draw down payments to employees over time. For, example, the Report identifies a draw down payment of accrued time to the City's Corporation Counsel in November 2017 of \$119,855 but neglects to indicate that the Corporation Counsel received a 17% salary increase *after* the draw down such that if that employee were paid upon separation, it would cost the City 17% more, assuming all other variables remained the same. Stated generally, and without reference to any individual example, if a draw down payment were collected and the banks of earned and accrued time were restored to that employee, a separation payment may result in an increased cost to the City. That is, if a draw down payment was returned only to be paid out at a higher rate upon separation, assuming all other variables remained the same, it would end up costing the City *more* than simply allowing the drawdown to stand. This is just one example of how following the recommendation to institute a legal action to retrieve a "questionable" payment may have the perverse effect incurring legal fees, incurring the risk inherent in any legal action, and after incurring said expenses and risk - even if the City were successful in retrieving the funds - may end up costing the City and taxpayers more than simply allowing the drawdown stand.

* * *

In conclusion, while the City welcomes the opportunity to improve its financial security and transparency, we hope the foregoing facts and legal analysis will provide a more complete picture of the Office's Report of Examination regarding separation and draw down payments made by the City to union and exempt employees. We look forward to the opportunity to provide any additional information that is needed to finalize your report. Please do not hesitate to contact the City with any questions you may have with regard to this letter.

Sincerely,



Anthony M. Capozzolo