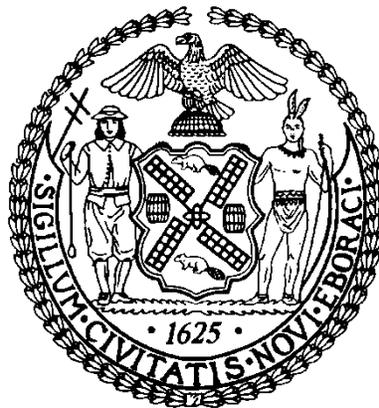


**CITY OF NEW YORK
OFFICE OF THE COMPTROLLER**

**John C. Liu
COMPTROLLER**

BUREAU OF FINANCIAL AUDIT

**H. Tina Kim
Deputy Comptroller for Audit**



**Audit Report on Pensioners of the
New York City Employees' Retirement System
Working for the City after Retirement
January 1, 2008–December 31, 2008**

FL10-117A

June 30, 2010



THE CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
1 CENTRE STREET
NEW YORK, N.Y. 10007-2341

John C. Liu
COMPTROLLER

June 30, 2010

To the Residents of the City of New York:

My office has audited the New York City Employees Retirement System (NYCERS) to identify retirees who may be reemployed by a City agency and illegally collecting a pension, and to quantify the amounts of any improper payments to individuals who appear to be violators of New York State Retirement and Social Security Law, §211 and §212 or New York City Charter §1117 during calendar year 2008. Audits such as this provide a means of ensuring that pensioners are complying with all laws pertaining to public service reemployment and that appropriate steps are taken to recoup improper payments to individuals after retirement.

The audit found five individuals who received \$32,835 in pension payments during 2008 that appear to violate applicable sections of State and City laws. These individuals were in apparent violation of §1117 of the New York City Charter because they were collecting disability pensions while earning more than \$1,800 (including pension payments) a year at a New York City agency.

The audit recommended that NYCERS officials investigate the cited pensioners, forward their names to the Department of Investigation should circumstances warrant such action, recoup any previous pension overpayments, and send reminders to retirees that state their responsibilities regarding public service reemployment.

The results of the audit have been discussed with NYCERS officials, and their comments have been considered in preparing this report. Their complete response is attached to this report.

If you have any questions concerning this report, please e-mail my audit bureau at audit@Comptroller.nyc.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "JCL".

John C. Liu

Table of Contents

AUDIT REPORT IN BRIEF

Audit Findings and Conclusions..... 1
Audit Recommendations..... 1

INTRODUCTION..... 2

Background..... 2
Objective..... 3
Scope and Methodology..... 4
Discussion of Audit Results..... 5

FINDINGS 6

Overpayment of Pension Benefits..... 6

RECOMMENDATIONS..... 7

APPENDIX I 2008 Pension Overpayments, New York City
Employees' Retirement System, Disability Retirees

APPENDIX II Reemployed New York City Employees' Retirement
System Pensioners, Totals by Current Employer

ADDENDUM New York City Employees' Retirement System Response

*The City of New York
Office of the Comptroller
Bureau of Financial Audit*

**Audit Report on Pensioners of the
New York City Employees' Retirement System
Working for the City after Retirement
January 1, 2008–December 31, 2008**

FL10-117A

AUDIT REPORT IN BRIEF

The objective of this audit was to identify New York City pensioners who may be reemployed by a City agency and illegally collecting a pension from the New York City Employees' Retirement System (NYCERS)—known as “double-dippers” or “disability violators”—and to quantify the amounts of any improper payments to individuals who appear to be violators of New York State Retirement and Social Security Law (RSSL) §211 and §212, or New York City Charter §1117, during calendar year 2008.

Audit Findings and Conclusions

The audit found five individuals who received \$32,835 in pension payments during 2008 that appear to violate applicable sections of State and City laws. These individuals were in apparent violation of §1117 of the New York City Charter because they were collecting disability pensions while earning more than \$1,800 a year (including pension payments) at a New York City agency.

Audit Recommendations

The audit makes four recommendations, that NYCERS officials should:

- Investigate those individuals identified as concurrently receiving pensions while being reemployed in public service. NYCERS officials should also commence prompt recoupment action against those individuals found to be illegally collecting pensions.
- Forward to the Department of Investigation, if the circumstances warrant such action, the names of individuals found to be illegally collecting pensions.
- Ascertain whether previous pension overpayments have been recouped and whether current pensions have been suspended for those individuals who have been cited in previous audits as “double-dippers” or “disability violators.”

- Send special reminders to service retirees under the age of 65 and to all disability retirees that clearly state their responsibilities regarding public service reemployment.

INTRODUCTION

Background

A New York City Employees' Retirement System (NYCERS) service retiree who is reemployed by the State or any of its political subdivisions may not continue to collect pension benefits, except in accordance with conditions established by the New York State Retirement and Social Security Law (RSSL), §210 through §216. In the case of New York City Employees' Retirement System disability retirees, the governing regulations are the New York City Administrative Code (Volume 3, Title 13) and the New York City Charter (§1117). If a post-retirement employee does not comply with the relevant laws, the practice is termed "double-dipping."

Pursuant to RSSL §211, a service retiree (a person receiving an ordinary service retirement rather than a disability retirement) who is reemployed in New York public service and who exceeds the §212 salary limitations may have his or her pension benefits denied, unless the service retiree requests that the prospective employer apply for a waiver from the State or municipal Civil Service Commission or other authorized agency. The prospective employer must set forth the reasons for the application and obtain a waiver from that agency.

New York State law grants the authority to issue waivers to the following seven agencies:

- New York State Civil Service Commission (NYS)
- Commissioner of Education (NYS)
- New York City Civil Service Commission (NYC)
- Chancellor of the New York City Department of Education (NYC)
- Board of Higher Education (CUNY) (NYC)
- Chancellor of State University (SUNY) (NYS)
- Administrator of Courts (NYS-NYC)

To obtain a waiver for an employee, the prospective employer of the retiree must show that the person's skills are unique and serve the best interests of the government service, and that no other persons qualified to perform the duties of the position to be filled are readily available for recruitment. Initial or renewed waivers may be for periods of up to two years.

An exception to this restriction is provided by RSSL §212, which permits a service retiree to be reemployed in New York public service if the retiree earns no more than the amount prescribed by that section and files a "Section 212 Statement of Election" with his or her

retirement system (see below). For calendar year 2008, the earnings limitation does not apply after the retiree reaches the age 65.

There are five New York City retirement systems that provide benefits for their employees and the employees of various City agencies. They are:

- New York City Board of Education Retirement System (BERS)
- New York City Employees' Retirement System (NYCERS)
- New York City Fire Department Pension Fund (FIRE)
- New York City Police Department Pension Fund (POLICE)
- New York City Teachers' Retirement System (TRS)

For calendar year 2008, the earnings limitation for a service retiree who filed a Statement of Election under §212 was \$30,000. Accordingly, any service retiree earning more than \$30,000 in 2008 should have received a §211 waiver to prevent suspension of the retirement allowance during that year. Failure to comply with these requirements can result in the forfeiture of pension benefits in subsequent years.

Disability retirees are not subject to RSSL §211 and §212. However, the New York City Administrative Code (Volume 3, Title 13, Chapter 1, §13-171), provides for the reemployment of NYCERS disability retirees in New York public service. These provisions (also known as "Disability Safeguards") apply up to only the minimum period for service retirement elected by the employee, subject to the following conditions: (1) the retiree undergoes a medical examination, (2) the Board of Trustees of the retirement system agrees with the medical board's report and certification of the extent to which the retiree is able to work (the Board must then place the retiree's name on a civil service list as a "preferred eligible"), and (3) the Board reduces the retiree's pension to an amount which, when added to the retiree's salary, does not exceed the current maximum salary for the next higher title than that held by the person at retirement.

After the minimum (20- or 25- year) period for service retirement has expired, disability retirees in New York City are subject to the New York City Charter §1117, which prohibits a retiree from earning more than \$1,800 a year (including pension payments) in New York public service, unless the retiree's disability pension is suspended during the time of such employment. Waivers superseding this provision may not be granted.

Objective

The objective of this audit was to identify those New York City pensioners who may be reemployed by a City agency and illegally collecting a pension from the New York City Employees' Retirement System—known as "double-dippers" or "disability violators"—and to quantify the amounts of any improper payments to individuals who appear to be violators of RSSL §211 and §212, or New York City Charter §1117 during calendar year 2008.

Scope and Methodology

We conducted this performance audit in accordance with generally accepted government auditing standards (GAGAS) except for organizational independence as disclosed in the following paragraph. 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 objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. This audit was performed in accordance with the audit responsibilities of the City Comptroller as set forth in Chapter 5, §93, of the New York City Charter.

We are issuing a modified GAGAS compliance statement because of the Comptroller's mandated non-audit responsibility in connection with the NYCERS Board. In accordance with §13-103 of the New York City Administrative Code, the Comptroller is one of eleven trustees of NYCERS. The Comptroller is represented on the Board by a designee. The Comptroller's designee was not involved in planning or conducting this audit or in writing or reviewing this audit report. Accordingly, we feel that the above issue has had no impact on the objectivity of this audit or on the conclusions and associated findings disclosed in this report.

Our audit period was January 1, 2008, through December 31, 2008. We met with NYCERS officials to review their monitoring processes for individual pensioners.

To discover the extent to which retired City employees were being improperly reemployed by City agencies, the Audit Bureau's IT Division performed a computer match of approximately 277,047 New York City pensioners against a listing of all City workers (approximately 407,216) who received a W-2 wage statement from the Financial Information Services Agency (FISA) for the year 2008.¹ This matching process identified 1,819 individuals under age 65 who received more than \$30,000 in 2008 (service retirees), or \$1,800 in 2008 (disability retirees). These individuals were then sorted by retirement system and investigated to determine the reasons these individuals received a pension check and a payroll check concurrently.

Among the valid reasons individuals received both pension checks and payroll checks are the following: some had been granted waivers; some had their pensions suspended at the appropriate times; and some were not actually employed during 2008 but instead received lump-sum payments for accrued vacation and sick leave or for having selected an early retirement program that provided subsequent cash payments in 2008. Although the match did not include local government employees paid by systems other than those integrated with FISA, we are presently conducting 2008 matches of City pensioners (BERS, NYCERS, FIRE, POLICE, and TRS) against the 355,000 State workers; the results of this match will be covered in a separate report (Audit # FL10-119A).

¹ A separate audit report will be issued for each of the five New York City retirement systems; the other four audits are FL10-118A (POLICE), FL10-114A (FIRE), FL10-115A (BERS), and FL10-116A (TRS).

Of the 1,819 matches, 95 consisted of individuals collecting NYCERS pensions. For all 95 matches, we:

- obtained additional detailed information about their individual year 2008 pension and payroll payments;
- analyzed the timing, and to some extent, the types of payments received;
- verified the amounts shown on the computer-match listing; and
- met with retirement system representatives, who assisted us in searching their files for waivers and other relevant information.

For those pensioners who appeared to lack valid reasons for receiving both pension and payroll checks, we calculated the apparent pension overpayments based on our analyses of when reemployed pensioners reached the legal earnings limitations of \$30,000 for service retirees and \$1,800 for disability pensioners. The annuity portions of the pension payments, if any, are not affected by RSSL §211 and §212 and New York City Charter §1117 and therefore should be excluded from the overpayments cited in this report. The annuity portions, which are estimated to be less than five percent of the total overpayments, can be determined only by NYCERS officials.

In addition, we followed up on the implementation status of the recommendations from last year's audit report—*Pensioners of the New York City Employees' Retirement System Working for the City after Retirement January 1, 2007–December 31, 2007*, FL09-117A, issued June 30, 2009—by reviewing provided correspondence from NYCERS.

Discussion of Audit Results

The matters covered in this report were discussed with NYCERS officials during and at the conclusion of this audit. A preliminary draft report was sent to NYCERS officials on May 10, 2010, and the applicable employing agencies. NYCERS officials decided to waive the exit conference. We submitted this draft report to NYCERS officials with a request for comments and received a written response from them on June 22, 2010. In their response, NYCERS officials agreed with one recommendation but differed on the resolution of the cited cases; they agreed with the remaining three recommendations.

The full text of the NYCERS response is included as an addendum to this report.

FINDINGS

Overpayment of Pension Benefits

This audit identified five individuals who received \$32,835 in pension payments during 2008 that appear to violate applicable sections of State and City laws. (See Appendices I and II for details concerning the retirees their current employers.)

These five individuals were in apparent violation of §1117 of the New York City Charter because they were collecting disability pensions while earning more than \$1,800 (including pension payments) a year at a New York City agency and had surpassed their applicable employment anniversary dates. The five individuals received improper pension payments of approximately \$32,835.

Our total represents the amount of improper 2008 pension payments based on an analysis of when the reemployed pensioners reached the legal earnings limitations (\$30,000 for service retirees, and \$1,800 for disability pensioners). Allowances were made for those retirees who worked only part of that year. Additionally, the annuity portions of the pension payments, if any, are not affected by New York City Charter §1117 and therefore should be excluded from the overpayments cited in this report. The annuity portions, which are estimated to be less than five percent of the total overpayments, can be determined only by NYCERS officials. Immediate action by NYCERS and the employing City agencies is needed to investigate and recoup, if appropriate, any improper payments made to these retirees identified as possible “double-dippers.”

The following is an example of a NYCERS disability retiree who was found to be working at a City agency during calendar year 2008:

CASE #1: A Correction Officer who retired in June 1997 on a disability pension collected 12 pension checks (January through December) in calendar year 2008, totaling \$16,265. At the same time, this individual worked as a Per-Diem Teacher for the Department of Education for nine months (January through July, October, and December) and collected a salary of \$11,320. This individual became a member of NYCERS in 1984 and therefore does not qualify for “Disability Safeguards” provisions beyond 2004. Accordingly, any earnings above \$1,800 for 2008 make the disability pension payments for the year improper. Therefore, it appears that seven pension checks (March through July, October, and December) totaling \$9,479 may have been improperly received and cashed in 2008.

It should be noted that in their correspondence concerning the implementation status of the recommendations from last year’s audit of 2007, NYCERS officials advised us that all the recommendations have been implemented and all overpayments have been recouped or are in the process of being recouped.

RECOMMENDATIONS

New York City Employees' Retirement System officials should:

1. Investigate those individuals identified as concurrently receiving pensions while being reemployed in public service. NYCERS officials should also commence prompt recoupment action against those individuals found to be illegally collecting pensions.

NYCERS Response: "We have investigated the five (5) pensioners cited who were employed by the City of New York and determined the following:

- Two (2) pensioners were retired under disability pursuant to §507a of the Retirement and Social Security Law (RSSL) and were not in violation, as the Personal Service Income Limitation was \$26,000 for calendar year 2008 and the two pensioners earned \$11,320 and \$8,055.
- Two (2) pensioners were retired under disability pursuant to §605 of the RSSL and were not in violation, as the Personal Service Income Limitation was \$26,000 for calendar year 2008 and the two pensioners earned \$13,472 and \$6,963.

"Regarding the above pensioners, attached is a memo written by the New York City Law Department, dated December 9, 2005, which addresses income limitations for employed pensioners that retired pursuant to §605, §507a, and §507c of the RSSL.

- One (1) pensioner retired under disability pursuant to §605b of the RSSL and was not in violation in calendar year 2008. This individual had a retirement date of October 11, 2007 per NYCERS' records, but his agency paid him terminal leave after his retirement date. The terminal leave paid to him covered the period up to January 31, 2008, causing him to exceed the \$1,800 limit pursuant to §1117 of the NYC Charter in January 2008. However, since there were no earnings after January 31, 2008, there was no suspension applicable in this case."

Auditor Comment: While we are pleased that NYCERS has investigated the cited pensioners, we disagree with NYCERS' interpretation of RSSL § 605. RSSL § 605 does not give NYCERS the authority to create an income limitation for disability pensioners, much less one that is contrary to the amount set by § 1117 of the New York City Charter.

In addition, the Comptroller's General Counsel's Office has reviewed the Law Department's opinion dated December 9, 2005, and opined as follows:

The Law Department's reliance in its December 9 opinion on RSSL §605, "Disability retirement," to create an exception to Charter §1117 is unpersuasive. Section 605 provides only that a criterion for eligibility for a disability pension from NYCERS and other non-uniformed services' public pension plans is that the member "is physically or mentally

incapacitated for the performance of gainful employment...” The Law Department opinion argues that this phrase allowed NYCERS to “set an amount of personal service income which a disability retiree could earn after retirement before being considered ‘gainfully employed’ and, therefore, subject to pension suspension.” That RSSL §605 language, however, refers only to the member’s physical or mental condition; it does not in any way refer to allowing a plan to set a level of State or City employment income that a disability retiree would be permitted to earn without triggering Charter §1117. Indeed, there is no mention whatsoever in RSSL §605 (or in §§507-a or -c) of setting an earned income limitation for any purpose, let alone of creating an exception to Charter §1117. Accordingly, there is also no support for the further statement in the Law Department’s December 9 opinion that “the requirement of the later-enacted [RSSL] statutes supersede the \$1,800 earnings cap of Charter §1117” for City disability retirees.

With regard to the remaining pensioner, terminal leave is paid to non-managerial employees separating from City service for their unused annual leave, compensatory time, and sick leave—if eligible. During this leave, the employee remains on the payroll and continues receiving all benefits, including health insurance, but does not accrue time. Clearly, this individual should not have been collecting his pension until his terminal leave was exhausted in February 2008. Therefore, NYCERS should recoup four pension payments, November and December 2007 and January and February 2008.

We maintain that all five individuals cited in this report were in violation of New York City Charter §1117 and should be required to repay the amount of improper payments they received.

2. Forward to the Department of Investigation, if the circumstances warrant such action, the names of individuals found to be illegally collecting pensions.

NYCERS Response: “NYCERS will refer all cases to the Department of Investigation that involve individuals who continuously and knowingly violate RSSL §211 or §212, NYC Administrative Code Sec 13-171 or NYC Charter §1117.”

3. Ascertain whether previous pension overpayments have been recouped and whether current pensions have been suspended for those individuals who have been cited in previous audits as “double-dippers” or “disability violators.”

NYCERS Response: “All pension overpayments for individuals cited in previous audit reports have either been fully recouped or are in the process of being recouped.”

4. Send special reminders to service retirees under the age of 65 and to all disability retirees that clearly state their responsibilities regarding public service reemployment.

NYCERS Response: “NYCERS sends a special notice regarding re-employment after retirement to our pensioners each year in September.”

APPENDIX I
2008 PENSION OVERPAYMENTS - NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM
DISABILITY RETIREES

Pension Number	Date Retired	2008 Pension	Months Overpaid	Amount Overpaid	2008 Employer	Payroll Code	2008 Salary	Disability Safeguards (DS)
Case #1 N-308981-0	6/23/1997	\$ 16,265	7	\$ 9,479	DEPT OF EDUCATION	746	\$ 11,320	NO
N-324737-0	3/30/2003	17,571	6	8,846	DEPT OF YOUTH	261	8,055	NO
N-311618-0	11/15/1998	13,911	6	6,920	CUNYCC - BRONX	463	13,472	NO
N-342658-0	10/11/2007	42,142	1	5,741	DEPT OF SANITATION	827	7,045	NO
N-342702-0	11/2/2007	22,622	1	1,849	DEPT OF EDUCATION	740	6,963	NO

Total Individuals: 5

Total: \$ 32,835

NOTES:

DEPT OF EDUCATION
CUNYCC - BRONX
DEPT OF SANITATION
DEPT OF YOUTH

Department of Education
City University of New York Community College - Bronx
Department of Sanitation
Department of Youth and Community Development Services

APPENDIX II

RE-EMPLOYED NYCERS PENSIONERS

TOTALS BY CURRENT EMPLOYER

Current Employer

	Payroll Code	Total Number of Individuals Paid Under Code
<u>Department of Education (DOE)</u>		
DOE Admin	740	1
DOE Per Diem Teachers	746	1
<u>Other Agencies</u>		
Department of Youth	261	1
CUNYCC – Bronx	463	1
Department of Sanitation	827	1
<u>Total</u>		<u>5</u>



June 22, 2010

Tina Kim
Deputy Comptroller for Audits
Office of the Comptroller
1 Centre Street
New York, N.Y. 10007-2341

**Audit Report FL10-117A
Pensioners Working for the City
Calendar Year 2008**

Dear Ms. Kim,

This letter is in response to the recommendations contained in the audit report referenced above.

Recommendation #1 – Investigate those individuals identified as concurrently receiving pensions while being reemployed in public service. NYCERS officials should also commence prompt recoupment action against those individuals found to be illegally collecting pensions.

Response

We have investigated the five (5) pensioners cited who were employed by the City of New York and determined the following:

- Two (2) pensioners were retired under disability pursuant to §507a of the Retirement and Social Security Law (RSSL) and were not in violation, as the Personal Service Income Limitation was \$26,000 for calendar year 2008 and the two pensioners earned \$11,320 and \$8,055.
- Two (2) pensioners were retired under disability pursuant to §605 of the RSSL and were not in violation, as the Personal Service Income Limitation was \$26,000 for calendar year 2008 and the two pensioners earned \$13,472 and \$6,963.

Regarding the above pensioners, attached is a memo written by the New York City Law Department, dated December 9, 2005, which addresses income limitations for re-employed pensioners that retired pursuant to §605, §507a, and §507c of the RSSL.

- One (1) pensioner retired under disability pursuant to §605b of the RSSL and was not in violation in calendar year 2008. This individual had a retirement date of October 11, 2007 per NYCERS' records, but his agency paid him terminal leave after his retirement date. The terminal leave paid to him covered the period up to January 31, 2008, causing him to exceed the \$1,800 limit pursuant to §1117 of the NYC Charter in January 2008. However, since there were no earnings after January 31, 2008, there was no suspension applicable in this case.

Recommendation #2 – *Forward to the Department of Investigation, if the circumstances warrant such action, the names of individuals found to be illegally collecting pensions.*

Response

NYCERS will refer all cases to the Department of Investigation that involve individuals who continuously and knowingly violate RSSL §211 or §212, NYC Administrative Code Sec 13-171 or NYC Charter §1117.

Recommendation #3 – *Ascertain whether previous pension overpayments have been recouped and whether current pensions have been suspended for those individuals who have been cited in previous audits as “double-dippers” or “disability violators”.*

Response

All pension overpayments for individuals cited in previous audit reports have either been fully recouped or are in the process of being recouped.

Recommendation #4 – *Send special reminders to service retirees under the age of 65 and to all disability retirees that clearly state their responsibilities regarding public service reemployment.*

Response

NYCERS sends a special notice regarding re-employment after retirement to our pensioners each year in September.

NYCERS is committed to constant and consistent monitoring to avoid pension overpayments. As part of our ongoing procedures, NYCERS suspends the retirement allowance when the pensioner exceeds the earning limitation as set forth in §211 and §212 of the RSSL, 13-171 of the NYC Administrative Code or §1117 of the NYC Charter.

If you have any questions, I can be reached at (347) 643-3522, or by email at mgoldson@nycers.nyc.gov.

Sincerely,

Michael A. Goldson
Director, Finance

Diane D'Alessandro, Executive Director, NYCERS



THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, NY 10007

MICHAEL A. CARDOZO
Corporation Counsel

INGA VAN EYSDEN
Tel.: (212) 788-0745
Fax: (212) 788-8900
ivaneysd@law.nyc.gov

MEMORANDUM

TO: Karen Mazza
General Counsel, NYCERS

FROM: Inga Van Eysden
Chief, Pensions Division

DATE: October 15, 2004

SUBJECT: Legal Issues

In response to your request, below is a summary of our positions on several issues you and John Murphy recently have brought to the attention of the Pensions Division.

RSSL §211 and retirees serving on the 18-B criminal attorney panel

As discussed with you and with counsel for DCAS, we agree that City retirees serving on the 18-B criminal attorney panel in the City of New York do not constitute consultants for purposes of RSSL §211.



MICHAEL A. CARDOZO
Corporation Counsel

THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, NY 10007

INGA VAN EYSDEN
Phone: 212-788-0745
Fax: 212-788-8900
E-mail: ivaneysd@law.nyc.gov

**CONFIDENTIAL
ATTORNEY-CLIENT
MEMORANDUM**

TO: Diane D'Alessandro
Executive Director
NYCERS

Milton Aron
Deputy Executive Director
NYCERS

FROM: Inga Van Eysden 
Chief, Pensions Division

Susan Sanders 
Senior Counsel, Pensions Division

DATE: December 9, 2005

SUBJECT: Issues Relating to Comptroller's Audits

You have asked us to opine on two matters that have been brought up in relation to Comptroller's Audit Reports FL05-100a, 103A and 104A. The Comptroller has questioned the income limitation set forth in NYCERS' Rule 23(a)(8), as it pertains to the procedures for determining continued entitlement to a disability retirement allowance under §§ 605, 507-a and

507-c of the RSSL. He also has questioned NYCERS' determination that a member who was reinstated to Tier 1 with an original membership date prior to May 31, 1973 is entitled to be re-employed as a consultant without suspension of pension benefits.

Income Limitation for Tier 3 and 4 Disability Retirees

Tier 1 and 2 disability retirees who are subsequently employed in the public sector are subject to the earning limitation of Charter § 1117 once they have passed the minimum age for service retirement. Administrative Code § 13-171. The Comptroller believes that Tier 3 and 4 disability retirees should also be subject to the \$1,800 annual limitation of Charter § 1117. Instead, Tier 3 and 4 NYCERS members who retire under §§ 507-a, 507-c or 605 of the RSSL are subject to the income limitation set forth in NYCERS' Rule 23(a)(8), originally adopted as Resolution # 73 of the Board of Trustees in August 1985 and amended to include RSSL § 507-c in October 1997.

Resolution # 73 was drafted with the assistance and approval of the Office of the Corporation Counsel in accordance with Corporation Counsel Opinion 15-84, dated May 18, 1984, which responded to a request of the NYCERS Board of Trustees to explain the meaning of the language "incapacitated for the performance of gainful employment" used in connection with disability retirement in RSSL § 605.¹ The Corporation Counsel Opinion concluded that the language of RSSL § 605 differed materially from the language of the Tier 1 and 2 disability statutes, which require that the member be "physically or mentally incapacitated for the performance of duty" (ordinary disability retirement) or "physically or mentally incapacitated for

¹ While the Corporation Counsel Opinion addresses only the language of RSSL § 605, RSSL §§ 507-a and 507-c, the two disability retirement statutes for NYCERS members who are correction officers, also contain the same requirement that the member be "incapacitated for the performance of gainful employment."

the performance of city-service” (accident disability retirement). The language in the Tier 1 and 2 disability statutes had consistently been construed by the Courts to mean that the applicant must be incapacitated for the performance of duties of the position he or she held.

The Corporation Counsel Opinion also compared the language of RSSL § 605 to the language of the Article 14 ordinary and accident disability statutes for non-uniformed members, RSSL §§ 506 and 507, respectively. In order for a member to receive benefits under either of these statutes, he or she must have been determined to be eligible for primary Social Security disability benefits. Thus, eligibility for disability benefits under RSSL §§ 506 and 507 is dependent upon the receipt of Social Security benefits under the standard used by the Social Security Administration, *i.e.*, “inability to engage in any substantial gainful activity.”

The Corporation Counsel Opinion concluded that, in enacting the Tier 4 RSSL § 605 “gainful employment” standard, the Legislature intended to ease the more restrictive Tier 3 Social Security requirement. It found, therefore, that NYCERS was not bound to construe or apply the “gainful employment” language of that statute in the same manner as the Social Security Administration interprets the term “substantial gainful activity” in its disability statute. The Opinion states:

[T]he Board in applying Article 15 may give the term “incapacitated for the performance of gainful employment” a reasonable interpretation which is consistent with the Legislature’s intent that an employee not receive disability retirement benefits merely because he or she is disabled from performing the duties of his or her particular position.

C.C. Op. 15-84 at p. 4.

Resolution # 73 strikes a balance between the less restrictive language of the Tier 1 and 2 statutes and the very restrictive language of the Tier 3 statutes by setting a standard for an initial finding of disability that is similar to that of Tiers 1 and 2, while requiring that people

who retire under the Tier 3 and 4 statutes have their earnings monitored after retirement to ensure that they are not capable of performing “gainful employment.”

Therefore, Resolution # 73 directed the Medical Board to continue to use the Tier 1 and 2 disability standard – “mentally or physically incapacitated for the performance of his or her job title” – when initially evaluating applicants for disability retirement under RSSL §§ 507-a and 605. See NYCERS Rule 23(a)(5)(a). When determining continuing entitlement to a disability retirement allowance under those statutes, however, Resolution # 73 set an amount of personal service income which a disability retiree could earn after retirement before being considered “gainfully employed” and, therefore, subject to pension suspension. This amount was set at \$13,5000 of personal service income for calendar year 1985 and had risen to \$22,6000 of personal service income by calendar year 2003. In this way, Resolution # 73 took into account the Corporation Counsel Opinion’s finding that the Legislature had envisioned the term “incapacitated for the performance of gainful employment’ . . . as requiring more than the employee’s incapacitation for the performance of duties of his position.” C.C. Op. 15-84 at p. 3.

In view of the statutory change from the “performance of duty” or “performance of city-service” disability standard of Tiers 1 and 2 of the to the “gainful employment” disability standard of the Tier 3 corrections statutes and Tier 4 basic disability statute, this office concludes that NYCERS validly exercised its statutory rulemaking powers in adopting the income limitation provision of Resolution # 73. See Administrative Code § 13-103(a)(1). We further conclude that the point at which a disability retiree under a statute containing a “gainful employment” standard reaches such income limitation is the point at which he or she may be considered to be gainfully employed and, thus, subject to pension suspension.

We recognize that Charter § 1117 has never been amended to reflect the legislative changes in disability retirement standards that have evolved as subsequent retirement tiers have been enacted. Nevertheless, we believe that the requirements of the later-enacted statutes supersede the \$1,800 earnings cap of Charter § 1117 in the case of former City employees who retired under the provisions of RSSL §§ 507-a, 507-c and 605. We therefore conclude that the pension suspension provisions of NYCERS Rule 23(a)(8)(c) through (e) provide a lawful alternative to those of Charter § 1117 for members who retired under RSSL §§ 507-a, 507-c and 605.

Re-employment as a Consultant

You have informed us that the Comptroller's audit has identified a person who joined NYCERS when Tier 4 was in effect and subsequently reinstated his membership to a date in Tier 1 which was prior to the enactment of RSSL § 211(4), the "consultant amendment." The Comptroller believes that this person must be subject to the consultant amendment, while it is NYCERS' position that the person is entitled to the rights in effect on the reinstated membership date. It is our opinion that NYCERS is correct.

The Comptroller relies on a 1974 Corporation Counsel Opinion, which states that any person who last became a member of a retirement system after May 31, 1973 is subject to the restrictions of RSSL § 211(4). The language of Chapter 646 of the Laws of 1999, codified at RSSL § 645, makes clear that the date a person last joined NYCERS is irrelevant once a reinstatement to an earlier membership date has taken place. Therefore, when a member reinstates to a Tier 1 membership and acquires a membership date prior to May 31, 1973, he or she is entitled to be re-employed upon retirement as a consultant without suspension of his or her pension.

This result is mandated by RSSL § 645, which provides that the member who returns to an earlier tier or membership date under its provisions “shall be deemed to have been a member of his or her current retirement system during the entire period of time commencing with and subsequent to the original date of such previous ceased membership” and “shall be entitled to all the rights, benefits and privileges” stemming from the original membership date. This broad language supports the inference that the member is to be treated as having commenced membership on the original membership date for all purposes. The sole exception to the entitlement of a reinstated member to “all the rights, benefits and privileges” of membership, which relates to reinstatement of service in a system other than the member’s current system, is beyond the scope of this inquiry.