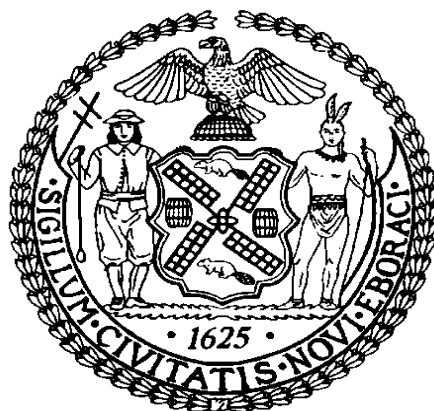


# **CITY OF NEW YORK OFFICE OF THE COMPTROLLER**

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## **A Compilation of Audits on Overtime Payments Made To Non-Pedagogical Civilian Employees**

*RS12-062S*

**October 6, 2011**

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

**A Compilation of Audits on Overtime Payments Made To  
Non-Pedagogical Civilian Employees**

**RS12-062S**

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**INTRODUCTION**

The City Comptroller's Office has conducted a series of three audits on the administration and controls of overtime by City agencies. These audits focused on whether the agency in question appropriately approved overtime and paid such overtime to employees in compliance with its own policies and procedures, labor laws, and other City regulations and guidelines and effectively managed and controlled overtime costs. These audits focused on City personnel covered under the Citywide agreement for non-uniform or pedagogical personnel (uniformed personnel being Police, Fire, Correction officers, and certain other employees characterized as being uniformed).

**Results**

The three audits found a common theme in the management of overtime: the lack of compliance with key provisions of the City's rules, procedures, regulations, and agency policies governing overtime. As a consequence, these agencies could not adequately determine whether overtime was being effectively utilized to achieve program goals.

We noted that the agencies did not generally request waivers from the Office of Labor Relations (OLR) for overtime that exceeds the overtime cap (Interpretive Memorandum #100). In each audit, we noted many instances where waivers that were required for employees to exceed the overtime cap were not requested by the respective agencies. Thus, excessive overtime spending above the cap became perfunctory instead of a planned strategy to help achieve agency program goals.

Finally, the audits found many instances where employees with 20 years or more of service or who were at least at the minimum retirement age were high-overtime earners.<sup>1</sup> This would affect the City's future pension liability because the employees highest earnings over a consecutive three-year period are factored, in part, when determining the retirement benefit of an employee upon retirement. However, we did not find that employees at or over the minimum age

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<sup>1</sup> Overtime earnings exceeded an employee's salary (including differentials: longevity payments, etc.) by 20 percent or more.

for retirement or with 20 years or more of service were overly represented among the highest overtime earners. We are still concerned about the risk of potential overtime abuse and its associated additional costs, considering the weaknesses in controls over overtime found in our audits.

We make several recommendations in this report, which include that agencies should:

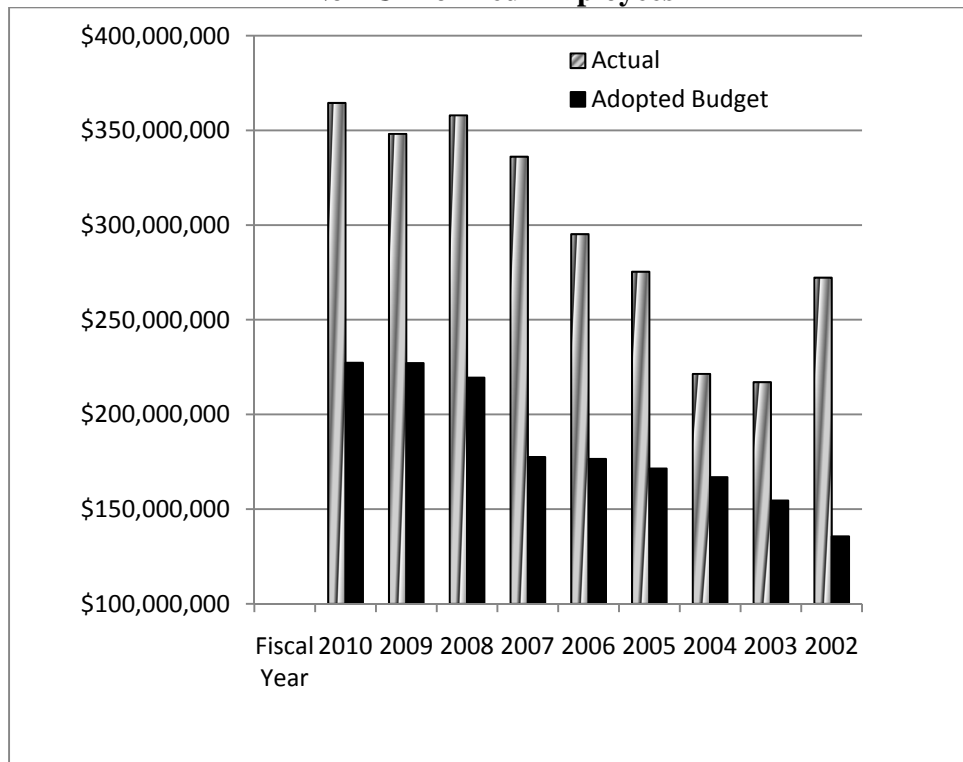
- Ensure that procedures set in place to manage and control overtime are implemented, enforced, and appropriately followed by agency management and staff as part of the agency's normal day-to-day business functions. These procedures should be reviewed periodically and updated as required to reflect changes in management's policies;
- Comply with regulations governing employees whose salaries exceed the overtime cap. Specifically, agencies should either obtain appropriate waivers or credit employees with compensatory time rather than paid overtime;
- Create a centralized review process that would allow agencies to assess whether the overtime is distributed equitably among employees to avoid potential abuse; and
- Ensure that a budget is created and kept up-to-date and used to collect, analyze, and monitor overtime spending.

## **Background**

Ensuring that agencies properly manage and control overtime costs is important to finding the optimal balance between achieving the program goals of the agency and its fiscal integrity. Moreover, it has long-term consequences for the City by affecting future pension liability because an employee's pension is based partly on total salary earned, including overtime.

In general, as shown in Chart 1, agencies have significantly overspent their annual overtime budgets. Some of this overspending is unavoidable and must be incurred to achieve the respective missions of the agencies in providing essential services to the public. However, Chart 1 clearly shows that annual overspending on overtime is substantial compared to the amount budgeted. This trend also brings up questions as to the effectiveness of the controls in place to manage overtime expenditures and, indeed, the willingness to properly use the controls in place.

**Chart 1**  
**Overtime Spending Actual Compared with Budget**  
**Non-Uniformed Employees**



**Table 1**  
**Overtime Spending**  
**Non-Uniformed Employees**  
**Adopted Budget Compared to Actual**  
**Percent of the Amount of Under-Budgeted Funding Per Fiscal Year**

Fiscal Year	Actual (A)	Adopted Budget (B)	Difference (C)	Percent Under-Budgeted (C)/(B)
2010	\$ 364,537,387	\$227,332,173	\$137,205,214	60.35%
2009	\$348,202,806	\$227,148,808	\$121,053,998	53.29%
2008	\$357,974,325	\$219,460,788	\$138,513,537	63.12%
2007	\$336,141,765	\$177,522,807	\$158,618,958	89.35%
2006	\$295,233,050	\$176,497,242	\$118,735,808	67.27%
2005	\$275,388,322	\$171,434,186	\$103,954,136	60.64%
2004	\$221,406,952	\$166,922,915	\$54,484,037	32.64%
2003	\$217,081,180	\$154,534,582	\$62,546,598	40.47%
2002 <sup>2</sup>	\$272,246,235	\$135,619,581	\$136,626,654	100.74%

<sup>2</sup> Fiscal Year in which September 11, 2001, terror attacks took place.

On a percent basis, under-budgeting of overtime for the non-uniformed workforce has remained above 53 percent since Fiscal Year 2005 and has ranged up to almost 90 percent in FY 2007 (please refer to Table 1). We have excluded FY 2002, when the City incurred large amounts of overtime expenditures in response to the terror attacks that occurred on September 11, 2001. In comparison to non-uniformed overtime spending, spending on uniformed employee overtime is more costly to the City budget, but acutely less under-budgeted (please refer to Chart 2 and Table 2). Under-budgeting for uniformed overtime since FY 2004 has ranged from roughly 43 percent in 2006 to 18.6 percent in FY 2009. We note that some overtime in the uniformed services is unavoidable and unforeseen due a number of factors that include special events, snowstorms, and terror alerts. Thus, budgeting for overtime for the uniformed workforce would seem to be more uncertain and thus more likely to lead to a large degree of systematic errors in budgeting than for the non-uniformed workforce. But this has not been the case. Instead, under-budgeting of overtime for the uniformed workforce has been substantially less than under-budgeting for the non-uniformed workforce.

Chart 2

Overtime Paid to Uniformed Employees  
Actual Compared to Adopted Budget

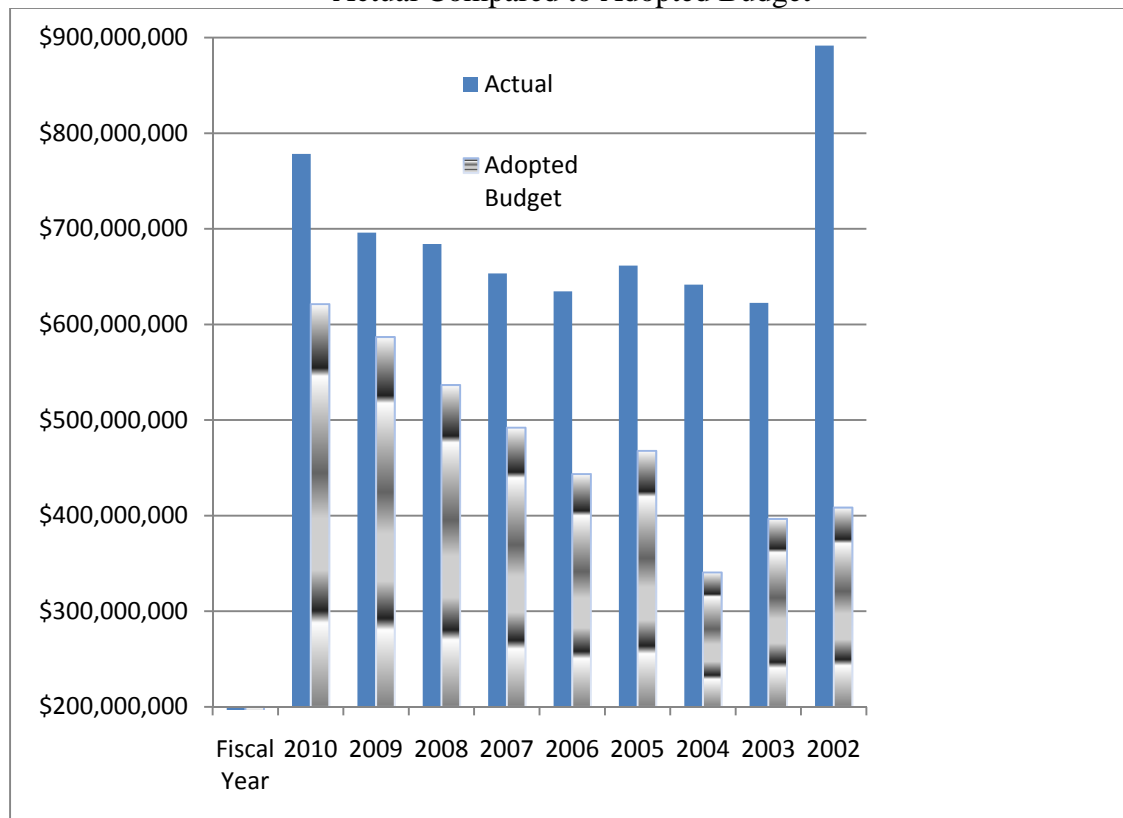


Table 2  
Overtime Spending  
Uniformed Employees  
Adopted Budget Compared to Actual  
Percent of the Amount of Under-Budgeted Funding Per Fiscal Year

Fiscal Year	Actual (A)	Adopted Budget (B)	Difference (C)	Percent Under-Budgeted (C)/(B)
2010	\$778,327,369	\$621,243,877	\$157,083,492	25.29%
2009	\$696,070,599	\$586,806,741	\$109,263,858	18.62%
2008	\$684,084,054	\$536,582,229	\$147,501,825	27.49%
2007	\$653,257,591	\$492,012,001	\$161,245,590	32.77%
2006	\$634,554,071	\$443,445,604	\$191,108,467	43.10%
2005	\$661,501,736	\$467,742,765	\$193,758,971	41.42%
2004	\$641,585,900	\$340,524,451	\$301,061,449	88.41%
2003	\$622,510,026	\$396,566,339	\$225,943,687	56.98%
2002	\$891,684,924	\$408,410,067	\$483,274,857	118.33%

This report highlights the common areas of ineffectiveness in agency management and control of overtime that we found in the three completed audits.

The standards and rules governing overtime are discussed below.

#### Federal Fair Labor Standards Act

New York City (the City) is required to follow the applicable provisions contained in the Federal Fair Labor Standards Act (FLSA) and its amendments. Overtime pay to employees is governed by FLSA. Under FLSA, an employer who requires or permits an employee to work overtime is obligated to pay the employee premium pay for such overtime work. Unless specifically exempted, such as most managerial employees, employees covered by FLSA must receive overtime pay for hours worked in excess of 40 hours in a work week at a rate not less than time and one-half their regular rates of pay. The overtime pay provision in FLSA may not be waived by agreement between the employer and employees. In this regard, FLSA provides minimum standards that may be exceeded, but cannot be waived or reduced. No provisions in FLSA relieve employers of their obligation under collective bargaining agreements with employees. Moreover, an employee is entitled to earn overtime pay even in the event that the employer announces overtime work will not be paid for unless authorized in advance.

## The Citywide Labor Agreement

The Citywide Agreement between the City and District Council 37 AFSCME, AFL-CIO<sup>3</sup> covers most of the City's non-managerial, non-uniform, and non-pedagogical employees. Non-managerial employees covered under labor agreements between the City and municipal labor unions are eligible to earn overtime pay. Employees under the jurisdiction of the provisions in the Citywide labor agreement who are ordered to work beyond their normal work hours ("involuntary overtime") are to be paid at the FLSA-defined overtime.<sup>4</sup> Employees who are authorized to voluntarily work extra hours ("voluntary overtime") beyond their normal work schedule receive compensatory time at the overtime rate up to the accrual of 240 hours and then are paid in cash at the overtime rate thereafter.<sup>5</sup> The Citywide agreement also makes a provision for an "overtime cap."<sup>6</sup> According to the agreement, when an employee's annual gross salary including overtime, all differentials, and premium pay is higher than the cap, compensatory time at the rate of straight time shall be credited for authorized overtime except as may be prescribed by FLSA. The overtime cap amount shall be adjusted by future collective bargaining increases.<sup>7</sup> Over the scope periods of the audits we conducted, the overtime cap was \$71,230 in Calendar Year 2008 and \$74,079 in Calendar years 2009 and 2010. The City's Office of Labor Relations (OLR) administers the overtime cap by issuing an "Interpretive Memorandum" each time the overtime cap is changed by a new labor agreement between the City and the labor unions. The Interpretive Memorandum also provides the following directive to agencies:

"When an employee's annual gross salary rate in effect on the date that overtime is performed, plus all overtime, differentials and premium pay paid during the calendar year to date, is higher than the applicable cap amount set forth above, such employee shall no longer be eligible to receive cash payment for such overtime, except as may be required pursuant to the Fair Labor Standards Act or authorized pursuant to an overtime cap waiver issued by the Office of Labor Relations, and shall instead receive compensatory time at the rate of straight time for all authorized overtime."<sup>8</sup>

## Mayoral Directive No. 94-3 – Overtime Reporting and Monitoring

Mayoral Directive No. 94-3 (MD 94-3) requires agency heads to monitor and report to the Mayor's Office of Operations (MOO) and the Office of Management and Budget (OMB) overtime usage in their agencies to ensure it is being properly utilized. As such, MD 94-3 requires agency heads to review a listing of the top overtime earners in their agency to "...ensure that overtime is being distributed equitably and to avoid abuse."

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<sup>3</sup> American Federation of State, County and Municipal Employees, American Federation of Labor—Congress of Industrial Organizations

<sup>4</sup> Citywide Agreement, January 1, 1995-June 30, 2001, Article IV, Section 3.

<sup>5</sup> Ibid, Section 4.

<sup>6</sup> Ibid, Section 7.

<sup>7</sup> Ibid, Section 7e.

<sup>8</sup> Interpretive Memorandum No. 100, section 1a.



We believe equitable distribution to mean over a broad range of employees with wage rates varying from very low to very high. Thus it would mean not having overtime clustered or skewed to employees who earn very high wage rates. It would also mean not distributing overtime based on employee seniority (years of service). A seniority-based distribution would skew upward the salaries of employees nearest retirement and inflate or cause to pad the respective employee's pension benefit upon retirement.

## **AUDITS CONDUCTED BY THE CITY COMPTROLLER'S OFFICE**

Audits of agency administration and controls of overtime by the City Comptroller's Office found a common theme in the management of overtime: The lack of compliance with the key provisions of the City's rules, procedures, regulations, and agency policies governing overtime. The City Comptroller's Office has completed three audits of agency administration and controls of overtime. The objective of the audits was to determine whether the agencies appropriately approved overtime and paid such overtime to employees in compliance with their own policies and procedures, labor laws, and other City regulations and guidelines and whether the agencies effectively managed and controlled overtime costs. The three audits we conducted were of individual City agencies: the Law Department, the Department of Homeless Services (DHS) and the Department of Health and Mental Hygiene (DOHMH) (*Audit Report on Controls over Overtime Payments at the New York City Law Department*, FR10-145A, March 25, 2011; *Audit Report on the Management and Control of Overtime Costs at the Department of Homeless Services*, MJ11-071A, October 6, 2011; *Audit Report on the Management and Control of Overtime Costs at the Department of Health and Mental Hygiene*, MG11-067A, October 6, 2011).

Our three audits of agency administration and controls of overtime uncovered a general lack of administration of overtime costs or a lack of effective and adequate monitoring of such costs. By agencies not adequately monitoring, authorizing, and administering overtime, the City cannot fully assess whether overtime is:

- In compliance with the Citywide Labor Agreement;
- In compliance with Interpretive Memorandum No. 100, which requires waivers from OLR for any overtime paid that exceeds the overtime cap.;
- Adequately controlled unless formal uniform policies and procedures are established, effective, and followed by the respective agencies; and
- Being distributed equitably to employees in accordance with MD 94-3.

As a consequence, these agencies could not adequately determine whether overtime was being effectively utilized to achieve program goals. We also noted that these agencies generally did not adhere to Interpretive Memorandum No. 100. In each audit we conducted, we uncovered many instances in which waivers that were required by Interpretive Memorandum No. 100 for employees to exceed the overtime cap were not requested by the respective agencies.

Thus, excessive overtime spending above the cap became perfunctory instead of a planned strategy to help achieve agency program goals. The general weaknesses in monitoring and in implementing effective policies and procedures regarding overtime provide uncertainty as to whether the ultimate goal of MD 94-3 and Interpretive Memorandum No. 100 are being achieved. Overtime usage to achieve program goals must always be weighed and balanced against the entity's fiscal integrity to reach an optimal balance. Without this balance, there is no assurance that agency program goals are being effectively and efficiently achieved.

The audits also found many instances where employees with 20 years or more of service or who were at least at the minimum retirement age were high overtime earners.<sup>9</sup> This would affect the City's future pension liability because the employees highest earnings over a consecutive three-year period are factored, in part, when determining the retirement benefit of an employee upon retirement. Thus, the overtime costs we found of those employees close to retirement may artificially increase their future retirement benefit and the City's long-term pension liability.

### **Law Department**

In an audit covering Fiscal Year 2009 and Calendar Years 2009 and 2008, we determined whether the Law Department (the Department) complied with labor laws, its policies and procedures, and other City guidelines governing the authorization and payment of overtime.

We found that the Department did not comply with the Citywide Agreement's overtime cap, which precludes certain employees from obtaining payments for overtime. As a result of not complying with the cap and not obtaining the required waivers from OLR, the Department paid 21 employees for inappropriate overtime totaling \$82,954 in Calendar Year 2009. The Department also paid employees overtime when their salaries were above the cap in Calendar Year 2008. Specifically, we found that 25 employees whose annual salaries exceeded the Calendar Year 2008 overtime cap of \$71,230 earned a total of \$103,851 in excess overtime. Overall, the excess overtime paid to employees in Calendar Years 2008 and 2009 totaled \$186,805. Of this amount, \$172,053 was earned by 16 employees in Calendar Years 2008 and 2009.

The audit also noted that all payments for overtime are a factor in calculating the pensions of employees who are members of the New York City Employees' Retirement System. The retirement system's formula for calculating pension payments to employees is based in part on an employee's highest three consecutive years of earnings, including overtime payments. Consequently, inappropriate overtime payments may inflate the value of an employee's pension, which is payable for the remainder of a retired employee's lifetime and could be passed on to a beneficiary.

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<sup>9</sup> Overtime earnings exceeded an employee's salary (including differentials: longevity payments, etc.) by 20 percent or more.

## **Department of Homeless Services**

The audit determined that the Department of Homeless Services (DHS) did not fully comply with its own procedures and other applicable rules and regulations governing the approval and payment of overtime. The auditors determined that such inconsistencies in compliance along with other disclosed control weaknesses inhibited DHS's effectiveness in managing and controlling employee overtime costs. As a consequence, the auditors noted the heightened risk of potential overtime abuse.

DHS procedures required that a division's Assistant Commissioner approve overtime when an employee's cumulative overtime earnings for the year was at or exceeded 10 percent of his/her adjusted annual base pay. When an employee's total overtime earnings for the year was at or above 15 percent of his/her adjusted annual base pay, the Assistant Commissioner was then required to submit the approval to the Deputy Commissioner for counter-signature. Further, if an employee's total overtime earnings for the year was at or exceeded 20 percent of his/her adjusted annual base pay, the approval form should have been submitted to the Commissioner for approval prior to the overtime being worked. In the case of emergencies, the appropriate signatures could be obtained after the overtime was worked.

Our tests involved 48 sampled employees, whose 2009 earnings totaled \$4,104,449, including regular earnings of \$3,044,920 and overtime earnings of \$1,059,529. Due to the disclosed control weaknesses regarding these 48 sampled employees, DHS paid overtime wages of: (1) \$220,690 to 39 employees without the required levels of senior management signoff noted above; (2) \$32,641 to 23 employees who exceeded the City's overtime cap and did not have required waivers; and (3) \$3,579 to four employees without justification for the overtime hours worked.

The auditors uncovered that DHS paid about 15 percent of the Department's employees significant amounts of overtime in both Calendar Years 2009 and 2010. In some instances, the employees' total annual overtime exceeded more than half of their regular earnings. This is of concern because DHS does not have a mechanism or procedure to investigate and follow up on continuous high-overtime earners. High-overtime earners are those employees paid total overtime of 20 percent or more of their total regular earnings for the calendar year (those that required Commissioner's approval per DHS procedures).

Accordingly, 312 (17.2 percent) of the 1,816 DHS employees paid overtime in Calendar Year 2009 were high-overtime earners with overtime earnings totaling \$5.4 million, ranging from 20 percent to up to 74 percent of their regular earnings. For Calendar Year 2010, of 1,549 employees who were paid overtime wages, 273 (17.6 percent) were high-overtime earners with total overtime wages of \$5.2 million, ranging from 20 percent to up to 80 percent of their regular earnings.

The auditors compared the high-overtime earners from Calendar Years 2009 and 2010, and they found that 164 employees were among the high-overtime earners in both years. For 2009, these 164 high-overtime earners were paid \$3.3 million (34 percent) of the total \$9.7 million in overtime earnings paid in that year. In 2010, the same employees were paid \$3.4 million (38 percent) of the Department's total \$8.8 million in overtime expenditures over that period.

DHS high-overtime earners were fairly distributed by years of service. But the auditors did note that in Calendar Year 2009, 39 percent of the high-overtime earners had more than 15 years of service, representing 39 percent of the total \$5.4 million paid to all 312 high-overtime earners. This is compared to Calendar Year 2010, where more than half (54 percent) of the 273 high-overtime earners had more than 15 years of service, representing 57 percent of the total \$5.2 million overtime wages paid to all 273 high-overtime earners.

An analysis from the auditors' raw data also reveals that of the high-overtime earners in Calendar Year 2010, 118 had 21 or more years of service compared with 83 high-overtime earners with such years of service in Calendar Year 2009. This represents an increase of 35 employees (or roughly 42.2 percent) classified as high-overtime earners in Calendar Year 2010 with over 21 years of service, even as the total amount of high-overtime earners declined from Calendar Year 2009 to Calendar Year 2010 by 39 employees or 12.5 percent. This analysis shows that although the trend of employees who are high-overtime earners has declined between Calendar Years 2009 and 2010, it is more skewed to those with 21 or more years of service (26.6 percent in Calendar Year 2009 compared with 43.2 percent in Calendar Year 2010). This trend could also reveal the potential for pension padding from excessive overtime earnings, as the number of those with greater years of service has increased as the total number of high-overtime earners has decreased.

### **Department of Health and Mental Hygiene**

We completed an audit of the management and control of overtime costs by the Department of Health and Mental Hygiene (DOHMH). We found that the DOHMH did not comply with the rules governing approval, authorization, and payment of overtime. Specifically, DOHMH failed to obtain waivers for employees whose salaries exceeded the Citywide Agreement's overtime cap. As a result, during Calendar Year 2009, DOHMH paid 561 ineligible employees a total of \$2.3 million in overtime payments, and during Calendar Year 2010, DOHMH paid 351 ineligible employees a total of \$1.4 million in overtime payments.

Furthermore, DOHMH did not effectively manage and control its employee overtime costs. In our analysis, we identified 414 employees at or over the minimum age for retirement (55 years of age) who earned a total of \$2.5 million in overtime in addition to the \$51.3 million they were paid in salaries during Calendar Years 2009 and 2010. This accounted for 18.5 percent of the total overtime payments for the two years combined. In addition, we found that 23 (15 percent) of the 153 high-overtime earners in Calendar

Year 2009 and 23 (19 percent) of the 118 high- overtime earners in Calendar Year 2010 were at or over the minimum age eligible for retirement, and they were allowed to earn overtime at more than 20 percent of their base salary.

The auditors noted that, even more significantly, overtime paid to employees without first obtaining the required waivers in Calendar Years 2009 and 2010 totaled \$3.7 million, of which \$2.7 million was earned by 237 employees who received overtime in both calendar years. These statistics are more acute when taking into account the fact that 89 (38 percent) of the 237 employees with excess overtime earned in both years were at or over the minimum age for retirement, thereby likely helping inflate their future pensions and increasing the City's pension cost.

### **Summary**

Our central finding of inadequate and ineffective monitoring of overtime costs and the general lack of compliance with the rules governing approval, authorization, and payment of overtime at the agencies we audited is troubling because it may highlight an imbalance between achieving program goals and fiscal integrity. The establishment of the overtime cap was to ensure that agencies were aware when they were relying too heavily on overtime to accomplish program goals. However, we found in the audits we conducted that the use of overtime appeared to be a more perfunctory method of achieving program goals. The overtime cap can be used as a monitoring tool that periodically forces management to evaluate the salaries and work schedules of employees approaching the cap and, if necessary, to create new strategies in an effort to reduce overtime costs. This would ensure that the service requirements of the agency are simultaneously balanced with sound fiscal control.

## **RECOMMENDATIONS**

As previously mentioned and clearly documented in all the audits conducted by the Comptroller's Office, the lack of compliance with the key provisions of the City's rules, procedures, regulations, and agency policies governing overtime and monitoring of overtime usage must be improved. This improvement would likely provide for more efficient programs by better balancing program goals and fiscal integrity. In that regard, agencies should work with MOO to formulate and institute uniform procedures in the effective allocation, authorization, planning, and monitoring of overtime to update the provisions in MD 94-3. This would include:

- Ensuring that procedures set in place to manage and control overtime are implemented, enforced, and appropriately followed by agency management and staff as part of the agency's normal day-to-day business functions. These procedures should be reviewed periodically and updated as required to reflect changes in management's policies;
- Complying with regulations governing employees whose salaries exceed the overtime cap. Specifically, agencies should either obtain appropriate

waivers or credit employees with compensatory time rather than paid overtime;

- Creating a centralized review process that would allow agencies to assess whether the overtime is distributed equitably and to avoid potential abuse; and
- Ensuring that a budget is created and kept up-to-date and used to collect, analyze, and monitor overtime spending.