City of New York

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Scott M. Stringer
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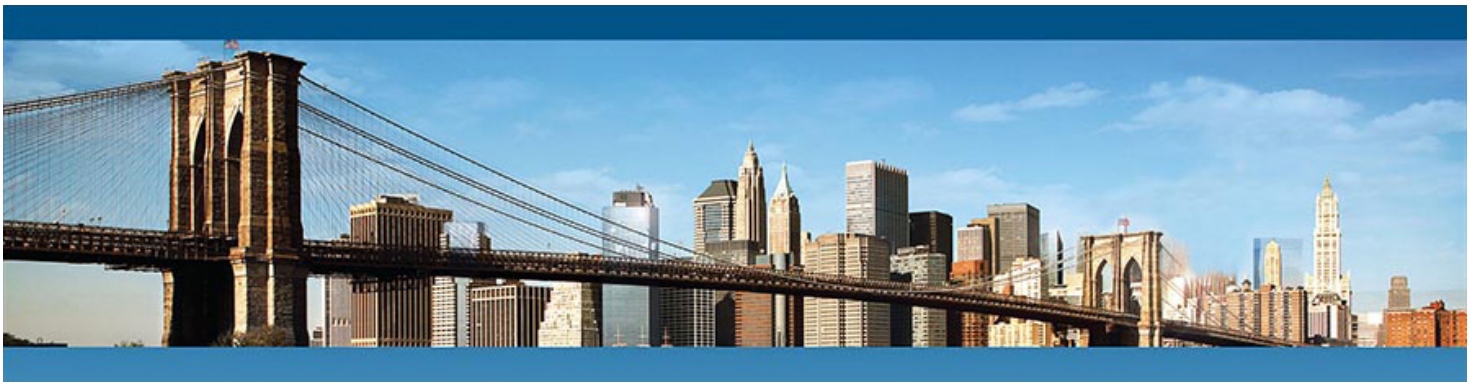

FINANCIAL AUDIT

Marjorie Landa
Deputy Comptroller for Audit

Audit Report on the Pensioners of the New York City Employees' Retirement System Working for the City after Retirement
January 1, 2014, to December 31, 2014

FN15-085A
April 11, 2016
http://comptroller.nyc.gov

THE CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
1 CENTRE STREET
NEW YORK, NY 10007

SCOTT M. STRINGER
COMPTROLLER

April 11, 2016

To the Residents of the City of New York:

My office has audited the New York City Employees' Retirement System (NYCERS) to identify New York City (City) pensioners who may be re-employed by a City agency and simultaneously illegally collecting a pension from NYCERS and to quantify the amount of any improper payments to such individuals who appear to be violators of the New York State (State) Retirement and Social Security Law (RSSL) §211 and §212 or New York City Charter §1117 during Calendar Year 2014. We audit the City's pension funds to ensure that pensioners are complying with all laws pertaining to public service re-employment and that appropriate steps are taken to recoup any improper payments made to individuals after retirement.

The audit found one NYCERS disability pensioner who appeared to have violated New York City Charter §1117. This pensioner received $2,588 in post-retirement earnings for Calendar Year 2014. New York City Charter §1117 prohibits a retiree from earning more than $1,800 a year in New York public service unless the retiree's disability pension is suspended during the time of such employment. The audit determined that this pensioner received $4,364 in potential pension overpayments.

In addition, the audit found that the birth dates for 53,910 NYCERS pensioners whose birth dates are maintained in the City's Pension Payroll Management System (PPMS) were different from the birth dates found in NYCERS' records.

The audit recommends that NYCERS investigate the individual identified in this report as a potential double dipper and, if confirmed to have received pension payments in violation of State or City law, recoup the overpayments. We further recommend that NYCERS send special reminders to service retirees under the age of 65 and to all disability retirees that clearly state the applicable income limitations and the retirees' responsibilities regarding public service re-employment. Finally, the audit recommends that NYCERS take appropriate action to insure that birth dates maintained in all databases are correct for the 53,910 pensioners identified in the report whose birthdays in NYCERS' records are different from the information maintained in PPMS.

The results of this audit have been discussed with NYCERS officials and their comments have been considered in preparing this report. Their complete written 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,

Scott M. Stringer

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THE CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
FINANCIAL AUDIT

Audit Report on Pensioners of the New York City Employees' Retirement System Working for the City after Retirement January 1, 2014, to December 31, 2014

FN15-085A

EXECUTIVE SUMMARY

The objectives of this audit are: (1) to identify New York City (City) pensioners who may be reemployed by a City agency and simultaneously illegally collecting a pension from the New York City Employees' Retirement System (NYCERS); and (2) to quantify the amount of any improper payments to such individuals who appear to be violators of the New York State (State) Retirement and Social Security Law (RSSL) §211 and §212 or New York City Charter §1117 during Calendar Year 2014.

NYCERS provides retirement benefits to full-time employees who work for the various New York City agencies. The reemployment of retired public employees in public service is governed by the RSSL.[1] Specifically, under RSSL Article 7 §212, a service retiree (a person receiving retirement benefits rather than a disability retirement) who is under the age of 65 can be reemployed in New York public service subject to an annual $30,000 earning limitation. This means that a NYCERS member who is not collecting a disability pension and is under age 65 may collect his/her pension and work for the City or State so long as he/she does not earn in excess of $30,000 per year from a public service position. If an under-65 service retiree earns in excess of $30,000 per year from a City or State public service position, the pension payments should be suspended unless the retiree has obtained a waiver under the RSSL.[2]

Disability retirees are not subject to RSSL §211 and §212, but rather 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 in New York public service unless the retiree's disability pension is suspended during the

[1] RSSL §210 defines "public service" as the service of the State or any political division, including a special district, district corporation, school district, board of cooperative educational services or county vocational education and extension board, or the service of a public benefit corporation or public authority created by or pursuant to laws of the State of New York, or service of any agency or organization which contributes as a participating employer in a retirement system or pension plan administered by the State or any of its political subdivisions.

[2] The earnings limitation does not apply after the retiree reaches the age of 65.

time of such employment. A retiree's disability payments are included in the calculation of whether the $1,800 cap has been exceeded.

Audit Finding and Conclusion

Our audit found one NYCERS disability pensioner who appeared to have violated New York City Charter §1117. This pensioner received $2,588 in post-retirement earnings for Calendar Year 2014, which resulted in $4,364 potential pension overpayments to this pensioner. The total amount of improper 2014 disability pension payments were calculated based on an analysis of when the reemployed pensioner reached the legal earnings limit of $1,800, and did not suspend pension payments during the applicable period of reemployment.

In addition, the audit found that of the approximately 134,500 NYCERS pensioners whose birth dates are maintained in the City's Pension Payroll Management System (PPMS), 53,910 were different from the birth dates contained in NYCERS' records. When we informed NYCERS officials of these birth date discrepancies, they stated that the majority of the discrepancies appeared to be the result of "dummy data" in PPMS. They said that the correct birth dates appeared to be in NYCERS records and that where different dates appeared in PPMS, those dates were most likely incorrect. This is of particular concern because inaccurate birth dates could affect any analysis that relied on PPMS to determine whether a pensioner may be in violation of RSSL §211 and §212.

Audit Recommendations

To address the non-compliance issue, we recommend that NYCERS:

- Investigate the individual identified in this report as a potential double dipper; if the person is found in violation of State or City regulations, commence recoupment action for the relevant periods.
- Send special reminders to service retirees under the age of 65 and disability retirees to detail their responsibilities regarding compliance with public service reemployment requirements.
- Take appropriate action to insure that birth dates maintained in all databases are correct, including, if necessary, contacting the pensioners to determine the correct birth dates of the 53,910 identified in this report whose birthdays in NYCERS' records are different from the information maintained in PPMS.

Agency Response

NYCERS officials generally disagreed with the findings and recommendations in the report. In doing so, they cited criteria for disability pensioners' earning limitations different than the criteria relied on by the audit. NYCERS officials contend the criteria they cited is applicable to the one pensioner whose payments were questioned. In addition, NYCERS officials maintained that the birth date inconsistencies identified in the audit would not affect the accuracy of NYCERS payments because they claimed that they rely on only correct data they maintain. However, with regard to our second recommendation that NYCERS send a special notice of pertinent rules to it members, NYCERS stated that it does send such a special notice out and provided us with information detailing the steps that it had taken and will be taking to inform their members regarding the reemployment restrictions.

Auditor Response

While NYCERS' relies on a December 2005 memorandum from the New York City Law Department to support its interpretation of applicable pension law as it relates to the payments questioned in this audit, the Comptroller's Office disagrees with the City Law Department's analysis for the reasons set forth in the written opinions of the Comptroller's Office of the General Counsel dated June 27, 2005 and April 5, 2006. We urge NYCERS to reconsider its position and practice based on the analysis provided by the Comptroller's Office of the General Counsel.

AUDIT REPORT

Background

NYCERS provides retirement benefits to full-time employees who work for the various New York City agencies. The reemployment of retired public employees in public service is governed by the RSSL. Specifically, under RSSL Article 7, §212, a service retiree (a person receiving retirement benefits rather than a disability pension) who is under the age of 65 can be reemployed in New York public service subject to an annual $30,000 earning limitation. This means that a member of the NYCERS system who retires before the age of 65 who is not collecting a disability pension may collect his/her pension and work for the City or State, provided he/she does not earn more than $30,000 per year from such a public service position.

If a retiree's post-retirement earnings in a New York City or State public service position exceeds the annual earnings limitation, the retiree's pension benefits should be suspended unless the retiree has obtained a waiver under RSSL §211. For a service retiree to obtain a waiver, the prospective employer must submit a request to the appropriate authorizing agency, including a statement setting forth the reasons for the waiver application. The application must show that the person's skills are unique and that the hire would be in the best interests of the government service; further, the prospective employer must show that no other qualified people are readily available to perform the duties of the position to be filled. Initial waivers and their renewal may be for periods of up to two years.

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

There are five New York City retirement systems that provide benefits for their agencies' employees as well as for employees of other 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)

Disability retirees are not subject to RSSL §211 and §212. However, 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 in New York public service unless the retiree's disability pension is

suspended during the time of such employment. A retiree's disability payments are included in the calculation of whether the $1,800 cap has been exceeded.

The New York City Administrative Code (Title 13, Chapter 1, §13-171) provides an exception for the reemployment of New York City disability retirees in New York public service. These provisions (also known as "Disability Safeguards") apply to disability retirees who have not served the minimum age for service retirement. To be covered by Disability Safeguards, a retiree must meet the following conditions: (1) the retiree must undergo a medical examination; (2) the Board of Trustees (the Board) of the retirement system must agree with the medical board 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 must reduce the retiree's pension to an amount which, when added to the retiree's salary, does not exceed the current maximum salary for the title next higher to that held by the person at retirement.

After the minimum period for service retirement has been reached, disability retirees in New York City are subject to the New York City Charter §1117. Waivers superseding this provision may not be granted.

When a retired employee subject to RSSL §211-§212 does not obtain a waiver and collects a pension while earning in excess of $30,000 in a public service job or, similarly, when a disabled pensioner who is subject to New York City Charter §1117, receives pension payments and earnings from a public sector position in excess of $1,800, the retiree is said to be "double-dipping."

Objectives

The audit's objectives are: (1) to identify those New York City pensioners who may be reemployed by a City agency and simultaneously illegally collecting a pension from the New York City Employees' Retirement System; and (2) to quantify the amounts of any improper payments to such individuals who appear to be violators of RSSL §211 and §212 or New York City Charter §1117 during Calendar Year 2014.

Scope and Methodology Statement

We conducted this performance audit in accordance with generally accepted government auditing standards, with an exception for organizational independence as noted in the subsequent 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. Although our audit did not include local government employees paid by systems other than those integrated with the City's payroll system run by the Financial Information Services Agency (FISA), we believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. This audit was conducted in accordance with the audit responsibilities of the City Comptroller as set forth in Chapter 5, §93, of the New York City Charter.

In accordance with §13-103 of the New York City Administrative Code, the Comptroller is one of 11 trustees of the Board of the New York City Employees' Retirement System and is entitled to

cast one vote.[3] The Comptroller sits on the Board through a representative. Neither the Comptroller nor his representative on the Board were involved in the audit process.

The audit's scope period was Calendar Year 2014. Please refer to the Detailed Scope and Methodology section at the end of this report for the specific audit procedures and detailed tests conducted during the course of this audit.

Discussion of Audit Results

The matters covered in this report were discussed with NYCERS during and at the conclusion of this audit. A preliminary draft was submitted to NYCERS on February 22, 2016, and was discussed at an exit conference held on March 4, 2016. We submitted a draft report to NYCERS, on March 17, 2016, with a request for written comments. We received a written response from NYCERS officials on March 25, 2016.

In their response, NYCERS officials generally disagreed with the findings and recommendations in the report. In doing so, they cited criteria for disability pensioner's earning limitations different that the criteria relied on by the audit. NYCERS officials contend the criteria they cited is applicable to the one pensioner whose payments were questioned. In addition, NYCERS officials maintained that the birth date inconsistencies identified in the audit would not affect the accuracy of NYCERS payments because they claimed that they rely on only correct data they maintain. However, with regard to our second recommendation that NYCERS send a special notice of pertinent rules to it members, NYCERS stated that it does send such a special notice out and provided us with information detailing the steps that it had taken and will be taking to inform their members regarding the reemployment restrictions.

While NYCERS' relies on a December 2005 memorandum from the New York City Law Department to support its interpretation of applicable pension law as it relates to the payments questioned in this audit, the Office of General Counsel of the Comptroller's Office disagrees with the City Law Department's analysis and issued written opinions to that effect in June 27, 2005 and April 5, 2006, copies of which are attached in Appendix I. We urge NYCERS to reconsider its position and practice based on the analysis provided by the Comptroller's Counsel.

NYCERS written response is attached as an addendum to this report.

[3] Members of the NYCERS Board include a representative of the Mayor, the Public Advocate, the Comptroller, and three employee representatives, who are each entitled to cast one vote. In addition, the Board includes representatives of each of the five Borough Presidents who are entitled to cast one-fifth vote. Thus, the total number of votes on any matter before the NYCERS Board will ordinarily be seven.

FINDINGS AND RECOMMENDATIONS

Potential Overpayment of Pension Benefits

Our audit found one NYCERS disability pensioner who appears to have violated NYC Charter §1117. This pensioner received $2,588 in post-retirement earnings for Calendar Year 2014 which resulted in $4,364 of potential pension overpayments to this pensioner for that year. This retiree worked for Hostos Community College as a Continuing Education Teacher in 2014 and at the same time collected 12 pension checks, totaling $17,457.[4] Based in this information, we calculated the total amount of improper 2014 disability pension payments based on an analysis of when the reemployed pensioner reached the legal earnings limit of $1,800, and nonetheless did not have a suspension of pension payments during the applicable period of reemployment.

Other Issue

Inaccurate Pensioners Birth Dates Maintained in PPMS

During our audit we found different birth dates in the City's electronic Pension Payroll Management System (PPMS) for 53,910 of the approximately 134,500 NYCERS pensioners whose birth dates were also maintained in NYCERS' records. Of these 53,910 pensioners, 24 were identified in PPMS as having been born in the 19th century, 52,889 were identified as having been born on January 1, 1901, and the remaining 997 were identified as having been born on some date other than the birth dates maintained in NYCERS' system.

When we informed NYCERS of the birth date discrepancies, a NYCERS official stated that the "FISA data" contained a significant amount of "unreasonable" dates.[5] For the 52,000 pensioners who were identified as having been born on January 1, 1901, the NYCERS official stated that these dates appear to be "dummy data." However, the official represented that NYCERS was not able to "determine the source of FISA data or reasons that FISA contains these dates."

These inaccurate birth dates could affect any analysis that relied on PPMS to determine whether a pensioner may be in violation of RSSL §211 and §212. This is of particular concern because it could potentially hinder appropriate monitoring of the propriety of pension payments. As noted, the applicability of the RSSL changes when a pensioner reaches the age of 65 and so it is critical to have accurate information about pensioners' ages. Accordingly, NYCERS officials should ensure the pensioners' information is accurately maintained.

Recommendations

NYCERS officials should:

1. Investigate the individual identified in this report as potential double dippers; if the person is found in violation of State or City regulations, commence recoupment action for the relevant periods.

[4] The annuity portions of the pension payments, if any, are not covered by RSSL §211 and §212 or New York City Charter §1117 and therefore were excluded from the overpayments cited in this report.

[5] FISA was used to extract relevant data from PPMS.

Agency Response: "We have investigated the pensioner cited who was employed with the City of New York and determined that this retiree was retired under disability pursuant to §507a of the Retirement and Social Security Law (RSSL). This individual was not in violation, as the Personal Service Income Limitation was $29,000 for calendar year 2014 and the pensioner earned $2,588 in postretirement earnings.

Regarding this pensioner, 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."

Auditors' Comment: On June 27, 2005 and April 5, 2006, the Comptroller's General Counsel's Office issued opinions concerning NYCERS' Personal Service Income policy (see Appendix I). In the later opinion, the Comptroller's Counsel specifically reviewed the Law Department's opinion dated December 9, 2005. In these opinions, General Counsel to the Comptroller supports the Comptroller's view that §605, §507a, and §507c of the RSSL does not give NYCERS the authority to create an income limitation for disability pensioners that is contrary to the amount set by §1117 of the New York City Charter.

The April 5, 2006 opinion of the Comptroller's General Counsel sets forth the Comptroller's Office analysis and conclusions as follows:

> The Law Department's reliance in its December 9, 2005 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.

2. Send special reminders to service retirees under the age of 65 and disability retirees to detail their responsibilities regarding compliance with public service reemployment requirements.

   Agency 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 limitations as set forth in §211 and

§212 of the RSSL, 13-171 of the NYC Administrative Code or§ 1117 of the NYC Charter."

3. Take appropriate action to insure that birth dates maintained in all databases are correct, including, if necessary, contacting the pensioners, to determine the correct birth dates of the 53,910 pensioners identified in this report whose birthdays in NYCERS' records are different from the information maintained in PPMS.

   Agency Response: "Birthdates for NYCERS' retirees are not being currently loaded into PPMS, and NYCERS does not maintain, monitor or rely on birthdate data within PPMS. As a public pension plan, birthdates are critical to the administration of NYCERS' pension benefits. NYCERS maintains a strong system of internal controls to ensure the accuracy of birthdate data within its own internal file system, and relies on that file system to administer accurate benefits. Although a birthdate field does exist in PPMS, there is no process that uses the stored birthdate data for any purpose. The most likely source of any valid birthdate data within PPMS probably resulted from the original conversion of data upon NYCERS' adoption of PPMS as its payment system, over a decade ago. NYCERS' internal data, not PPMS, should be the source for any analysis requiring the use of birthdates for NYCERS' pensioners."

   Auditors' Comment: NYCERS response explained how the majority of discrepancies were created—by not uploading the retiree's birth date to PPMS. Even though NYCERS stated that it does not maintain, monitor or rely on birth date data within PPMS, we believe birth date is an important field in PPMS because any external analysis of any pensioners could rely on the data maintained in the PPMS. Inaccurate birth dates could hinder any analysis that uses the birth date field as a criteria.

DETAILED SCOPE AND METHODOLOGY

We conducted this performance audit in accordance with generally accepted government auditing standards except for organizational independence as noted in the subsequent 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. Although our audit did not include local government employees paid by systems other than those integrated with FISA, we believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. This audit was conducted in accordance with the audit responsibilities of the City Comptroller as set forth in Chapter 5, §93, of the New York City Charter.

In accordance with §13-103 of the New York City Administrative Code, the Comptroller is one of 11 trustees of the Board of the New York City Employees' Retirement System and is entitled to cast one of the board's seven votes, (six votes can be cast by six of the members, including the Comptroller, while the remaining five members who represent each of the five Borough Presidents may each cast a one-fifth vote, which makes up the seventh possible vote on the Board). The Comptroller sits on the Board through a representative. Neither the Comptroller nor his representative on the Board were involved in the audit process.

The scope period of this audit was Calendar Year 2014. We met with NYCERS officials to obtain an understanding of their payment processes for individual pensioners. To discover the extent to which retired City employees were improperly receiving pension payments from the retirement systems, we obtained the following information:

- payments summary for active New York City pensioners from PPMS (the City's pension payroll management system),[6]
- member records from all five retirement systems,
- City workers who received a W-2 wage statement, and
- Waivers information from three of the seven authorized agencies: New York State Civil Service Commission, New York City Department of Citywide Administration, and City University of New York.[7]

To determine the accuracy of the PPMS members' information, we compared the members' social security numbers and birth dates with the data provided from each retirement system. We then eliminated the pensioners who were over or turned 65 in 2014 because the earning limitation does not apply after a retiree reaches the age of 65. We identified 90,356 pensioners who were under age 65 during Calendar Year 2014 and received payments through PPMS.

We matched the 90,356 New York City pensioners against a listing of all City workers who received a W-2 wage statement.[8] This matching process identified 639 individuals who:

[6] The information was provided by FISA, which is the custodian of the City's Payroll Management System and Pension Payroll Management System.

[7] According the Personnel Rules and Regulations of the City of New York, Department of Citywide Administration shall have all the powers and duties of the Municipal Civil Service Commission provided in the civil service law or in any other statute or local law. Board of Higher Education became CUNY's Board of Trustees.

[8] A separate audit report has or will be issued for each of the five New York City retirement systems; the other four audits are FN15-082A (TRS), FN15-083A (POLICE), FN15-084A (BERS), and FN15-086A (FIRE).

- collected NYCERS pensions during calendar year 2014,
- were under age 65, and
- are either service retirees who retired prior to January 1, 2014, and received more than $30,000 in wages during 2014, or disability retirees who received $1,800 in pension payments and wages from the City during 2014.

We excluded the service retirees who had waivers that covered Calendar Year 2014 and then determined the reasons for the remaining individuals to receive a pension check and a payroll check concurrently. Among the valid reasons are the following: some had pensions suspended at the appropriate times; and some were not actually reemployed by the City agencies during 2014, but instead received lump-sum payments for accrued vacation, sick leave, or selected an early retirement program that provided subsequent cash payments in 2014.[9] Although the match did not include local government employees paid by systems other than those integrated with FISA, we are presently conducting year 2014 matches of City pensioners (BERS, NYCERS, FIRE, POLICE, and TRS) against the State workers and City consultants receiving a 1099; the results of this match will be covered in separate reports (Audit # FN15-087A and FN15-088 respectively).

For the two individuals we identified who appeared to have violated the New York City Charter §1117 prohibition on reemployment, we:

- obtained additional detailed information about their individual pension and payroll payments;
- analyzed the timing and the types of payments received that were considered as earned income;
- verified the amounts shown on the computer-match listing; and
- contacted retirement system representatives, who assisted us in searching the pensioners' files for waivers and other relevant information (if any).

For the remaining pensioner 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 the reemployed pensioner reached the legal earnings limitation of $30,000 for service retirees or $1,800 for disability pensioners. The annuity portions of the pension payments, if any, are not covered by RSSL §211 and §212 and New York City Charter §1117, and therefore were excluded from the overpayments cited in this report.

[9] Information for payroll checks is limited to the City agencies that use the City's Payroll Management System to process their payrolls.

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Allen Fitzer
Deputy General Counsel

EMAIL: afitzer@COMPTROLLER.NYC.GOV

To: Gary Rose
B. Anthony Scully

From: Allen Fitzer

Date: June 27, 2005

Re: NYCERS Audit

In furtherance of your request for a review of the fact that NYCERS claims, in response to your draft audit, that "P#309831 did not go over the limit of $22,600, citing NYCERS Resolution R-73 dated November 22, 1985 as its justification, be advised of the following:

City Charter § 1117 deals with "a person receiving a pension or a retirement allowance made up of such pension and an annuity . . ." There is no distinction as to whether it is an ordinary pension or a disability pension. That individual, according to the Charter, can not earn more than $1800. from the City or State (with some exceptions regarding their position) and continue to collect his/her pension.

Resolution R-73 sets the income limitation for a person collecting a disability pension at $13,500 plus an increased percentage based on the Consumer Price Index (purported to currently total $22,600). Provision 9 of that resolution reads that "... the Charter of the City of New York . . . shall apply to members retired for disability under these rules unless inconsistent with these rules . . ."

If the individual (P#309831) in fact received in excess of $1800 from the City or State, it is my opinion that NYCERS can not promulgate a resolution which gives that individual the ability to collect up to $22,600 from the City or State before NYCERS determines that the pension should be discontinued. The Court in Barbera v. New York City Employees Retirement System, 211A.D.2d 406; 621 N.Y.S.2d 46 (App Div, 1st Dept) 1995 noted in dicta that "its (NYCERS) present position is inconsistent with the governing statutory section . . .((NYC Charter § 1117)".

(continued)

The Court's ruling in Barbera was based on the fact that NYCERS position could not be inconsistent with §1117 of the City Charter. Therefore, a resolution promulgated by NYCERS which states that any Charter provision which is inconsistent with its resolution is not applicable to members retired for disability could not withstand a legal challenge.

Article 14, §507-a (3)(c) of the new York Retirement and Social Security Law states that ". . .Each retirement system shall be entitled to adopt appropriate procedures for. . .continued entitlement to a disability retirement allowance."

It is my opinion that NYCERS can not create their own income limitation for their disability pensioners which is contrary to the amount set by the City Charter. It can not be successfully argued by NYCERS that this is an "appropriate procedure" under the law.

Cc: Phyllis Taylor

MEMORANDUM

TO: Files
FROM: Richard Simon
RE: Review of Prior Opinion on NYCERS Audit Issue
DATE: April 21, 2006

On June 27, 2005, in connection with a Comptroller audit report on NYC pensioners working for New York State after their retirement, Allen Fitzer of General Counsel submitted his written opinion that NYCERS Rule 23(a)(8) (NYCERS Resolution #73), permitting recipients of a NYCERS disability pension to earn up to $22,600 from State or City employment without thereby reducing that pension, was in conflict with Charter §1117, and therefore, invalid. On December 9,2005, the Law Department provided to NYCERS an opinion disagreeing with Allen Fitzer's conclusion, and stating that NYCERS' rule was permissible in light of RSSL §605 and related provisions. On March 9, 2006, Audit Manager Anthony Scully requested that General Counsel review the issue again in light of the Law Department's opinion. At the direction of Phyllis Taylor, I have now done so, and I conclude that Allen Fitzer's opinion is correct, and that the Law Department's opinion is in error.

Charter §1117, "Pensioner not to hold office," is clear and unambiguous on this point: If the recipient of a City pension "shall hold and receive any compensation from any [State or City] office," then during that time, "the payment of said pension only shall be suspended and forfeited" unless "the pension and the salary or compensation of the office, employment or position amount in the aggregate to less than one thousand eight hundred dollars annually." (emphasis added). The NYCERS rule, with its current limit of $22,600, is plainly in conflict with this Charter provision.

The Law Department's reliance in its December 5 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 requirements of the later-enacted [RSSL] statutes supersede the $1,800 earnings cap of Charter §1117" for City disability retirees. I note, in that regard, that it is a basic principle of New York statutory interpretation that "repeals by implication are not favored by the courts." *See* 1 *McKinney's*, "Statutes," §391; *see also* §§ 391-400, *passim*. That is particularly true where, as here, the purported repealing or superseding statute makes no mention of either the earlier statute or its subject matter. *Id.*

In sum, upon review, Mr. Fitzer's opinion of June 27, 2005 was and is correct.

March 24, 2016

Marjorie Landa
Deputy Comptroller for Audit
Office of the Comptroller
1 Centre Street
New York, N.Y. 10007-2341

Audit Report FN15-085A
Pensioners Working for the City
Calendar Year 2014

Dear Ms. Landa,

This letter is in response to the recommendations contained in the audit report referenced above. The audit cited one disability pensioner that appeared to have violated NYC Charter § 1117.

Recommendation #1 – *Investigate the individual identified in this report as a potential double dipper. If the individual is found in violation of the State or City regulations, commence recoupment action against them for the relevant periods.*

Response

We have investigated the pensioner cited who was employed with the City of New York and determined that this retiree was retired under disability pursuant to §507a of the Retirement and Social Security Law (RSSL). This individual was not in violation, as the Personal Service Income Limitation was $29,000 for calendar year 2014 and the pensioner earned $2,588 in post-retirement earnings.

Regarding this pensioner, 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.

Recommendation #2 – *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 limitations as set forth in §211 and §212 of the RSSL, 13-171 of the NYC Administrative Code or §1117 of the NYC Charter.

Recommendation #3 – *Take appropriate action to ensure that birth dates maintained in all databases are correct, including, if necessary contacting pensioners, to determine the correct birth dates of the 53,910 pensioners identified in this report whose birthdays in NYCERS' records are different from the information maintained in PPMS.*

Birthdates for NYCERS' retirees are not being currently loaded into PPMS, and NYCERS does not maintain, monitor or rely on birthdate data within PPMS. As a public pension plan, birthdates are critical to the administration of NYCERS' pension benefits. NYCERS maintains a strong system of internal controls to ensure the accuracy of birthdate data within its own internal file system, and relies on that file system to administer accurate benefits. Although a birthdate field does exist in PPMS, there is no process that uses the stored birthdate data for any purpose. The most likely source of any valid birthdate data within PPMS probably resulted from the original conversion of data upon NYCERS' adoption of PPMS as its payment system, over a decade ago. NYCERS' internal data, not PPMS, should be the source for any analysis requiring the use of birthdates for NYCERS' pensioners.

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

Sincerely,

Michael A. Goldson
Director, Finance

Diane D'Alessandro, Executive Director, NYCERS

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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.