

City of New York

OFFICE OF THE COMPTROLLER

Scott M. Stringer
COMPTROLLER



FINANCIAL AUDIT

Marjorie Landa

Deputy Comptroller for Audit

Audit Report on New York City
Pensioners Working as Consultants for
the City after Retirement

January 1, 2014 to December 31, 2014

FN15-088A

June 1, 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

June 1, 2016

To the Residents of the City of New York:

My office has audited the five New York City retirement systems to identify City pensioners who may be working as consultants for the City and simultaneously illegally collecting a pension from a City retirement system. We further sought to quantify the amount of any improper payments to such individuals 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 appears to have violated New York City Charter §1117 because the pensioner received disability payments and earnings through New York public service of more than \$1,800, and did not suspend pension payments during the time of such re-employment. The audit determined that this pensioner received \$7,109 in potential pension overpayments during Calendar Year 2014.

The audit recommends that NYCERS investigate the individual identified in this report and, if confirmed to have received pension payments in violation of State or City law, recoup the overpayments. The audit further recommends 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.

The results of our audit have been discussed with officials from the five retirement systems and their comments have been considered in preparing this report. Their complete written responses are 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 New York City Pensioners Working as Consultants for the City after Retirement January 1, 2014 – December 31, 2014

FN15-088A

EXECUTIVE SUMMARY

The objectives of this audit are: (1) to identify any New York City pensioners who may be receiving earnings as consultants in public service as defined in the New York State Retirement and Social Security Law (RSSL) §211 and illegally collecting a pension from a New York City retirement system and (2) to quantify the amount 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 2014.

The City of New York (the City) has five retirement systems that provide retirement benefits for the employees of various City agencies. The five systems are the New York City Board of Education Retirement System (BERS), the New York City Employees' Retirement System (NYCERS), the New York City Fire Department Pension Fund (FIRE), the New York City Police Department Pension Fund (POLICE), and the New York City Teachers' Retirement System (TRS).

The re-employment 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 other than disability retirement benefits) who is under the age of 65 can be re-employed in New York public service subject to an annual \$30,000 earning limitation.¹ This means that a member of one of the five retirement systems 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, as long as he/she does not earn in excess of \$30,000 per year from a New York State public service position. If a retiree's post-retirement earnings in a New York State public service position exceed the annual earnings limitation, the retiree's pension benefits should be suspended unless the retiree has obtained a waiver under RSSL §211.²

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 This suspension does not apply to certain types of re-employment, such as being elected to public office. However, RSSL §211 (4) states: "A retired person who returns to public service on or after January first, nineteen hundred seventy-four, as a consultant shall be subject to the limitations applicable to a reemployed retiree as specified in this section or in any other provision of law."

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 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.

Audit Finding and Conclusion

Our audit found one NYCERS disability pensioner who appears to have violated NYC Charter §1117 while working as a consultant for New York City. This pensioner, who retired in February 2008 as a disability retiree and worked as a consultant for the New York City Human Resources Administration, collected \$10,800 in earnings while collecting \$21,298 in 12 pension checks. This pensioner appears to have violated New York City Charter §1117 because he received disability payments and earnings through New York public service of more than \$1,800, and did not suspend pension payments during the time of such re-employment. As a result, this pensioner may have improperly received four pension payments of \$7,109 during Calendar Year 2014.

Audit Recommendations

NYCERS officials should:

- Investigate the NYCERS pensioner identified in this report and recoup any overpayments this pensioner received in violation of State or City law.
- Send special reminders to its service retirees under the age of 65 and to all disability retirees that clearly state the applicable income limitations and the retirees' responsibilities regarding compliance with public service re-employment.

NYCERS Response

NYCERS officials generally disagreed with the finding and the first recommendation in the report. In doing so, NYCERS cited criteria for disability pensioners' earning limitations different from the criteria relied on by the audit. NYCERS officials contend the criteria they cited is applicable to the pensioner whose payments we question. With regard to our second recommendation that NYCERS send a special notice of pertinent rules to its 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.

Auditors 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 21, 2006. We urge NYCERS to reconsider its position and practice based on the opinion provided by the Comptroller's Office of the General Counsel.

AUDIT REPORT

Background

The City has five retirement systems, BERS, NYCERS, FIRE, POLICE, and TRS, that provide retirement benefits for the employees of various City agencies and the retirement systems.

The re-employment 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 disability retirement benefits) who is under the age of 65 can be re-employed in New York public service subject to an annual \$30,000 earning limitation. This means that a member of one of the five retirement systems who retires before the age of 65 who is not collecting a disability pension and who is under age 65 may collect his/her pension and work for the City or State, as long as he/she does not earn in excess of \$30,000 per year from a New York 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. 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)

Waiver requests must include a statement setting forth the reasons for the waiver application. Further, the application must show that the person's skills are unique and that the person's hire would be in the best interests of the government service; the prospective employer also must show that no other qualified persons are readily available for recruitment to perform the duties of the position to be filled. Initial waivers and their renewal may be for periods of up to two years.

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 time of such employment. A retiree's disability payments are included in the calculation of whether the \$1,800 cap has been exceeded. Although waivers superseding New York City Charter §1117 may not be granted, exceptions are allowed if a retiree meet the conditions prescribed in the New York City Administrative Code (Title 13, Chapters 1-3). These provisions, also known as "Disability Safeguards," apply to disability retirees who meet the following requirements applicable to the respective retirement systems.

For POLICE, FIRE, and NYCERS disability retirees who did not serve the minimum period for service retirement, the New York City Administrative Code (§13-254, §13-356, §13-357, and §13-

171) prescribes the conditions that are required for re-employment in New York public service.³ Pursuant to the Administrative Code, all three of the following steps must be taken: (1) the retiree must undergo a medical examination; (2) the applicable Board of Trustees must agree with the medical board report and certification of the extent to which the retiree is able to work (and the Board of Trustees must then place the retiree's name on a civil service list as a "preferred eligible"); and (3) the Board of Trustees 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 next higher title than that held by the person at retirement. After the minimum period for service retirement has expired, POLICE, FIRE, and NYCERS disability retirees are subject to the restrictions set forth in New York City Charter §1117.

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 objectives of this audit are: (1) to identify any New York City pensioners who may be receiving earnings as consultants in public service as defined in RSSL §211 and illegally collecting a pension from a New York City retirement system and (2) to quantify the amount 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 2014.

Scope and Methodology Statement

We conducted this performance audit in accordance with generally accepted government auditing standards (GAGAS). 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 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 of the New York City Administrative Code, the Comptroller is a member of Board of Trustees of NYCERS, POLICE, FIRE, and TRS. The Comptroller sits on the boards of these retirement systems through a representative. Neither the Comptroller nor his representative on each board were involved in the audit process.

The scope period of this audit 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.

³ BERS has no "Disability Safeguards" for its members. TRS disability retirees who are under age 65, per New York City Administrative Code, Title 13, Chapter 4, §13-553, must undergo a medical examination every year. In addition, within the first 10 years of the disability retirement that was granted, if the medical board determines a retiree is no longer physically or mentally incapacitated for the performance of duty, the retiree should be reappointed to a position like the one held. After 10 years, the reappointment is optional.

Discussion of Audit Results

The matters covered in this report were discussed with officials of the five City retirement systems during and at the conclusion of this audit. A preliminary draft report was sent to officials of the five City retirement systems. Subsequently, each of the five City retirement systems informed us that they decided to waive the exit conference. On May 9, 2016, we submitted a draft report to the five retirement systems with a request for comments. We received a written response from FIRE, NYCERS, and BERS officials on May 11, 2016, May 12, 2016, and May 16, 2016 respectively. TRS and POLICE did not send a written response.

NYCERS officials generally disagreed with the finding and the first recommendation 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 pensioner whose payments was questioned. With regard to our second recommendation that NYCERS send a special notice of pertinent rules to its 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 Comptroller's Office disagrees with the City Law Department's analysis and the Office of the General Counsel issued written opinions to that effect in June 27, 2005, and April 21, 2006, copies of which are attached in Appendix I. We urge NYCERS to reconsider its position and practice based on the opinion provided by the Comptroller's Counsel.

FIRE, NYCERS, and BERS' written responses are attached as an addendum to this report.

FINDING AND RECOMMENDATIONS

Potential Overpayment of Pension Benefits

Our audit found one NYCERS disability pensioner who appears to have violated NYC Charter §1117 while working as a consultant for New York City. This pensioner, who retired in February 2008 and worked as a consultant for the New York City Human Resources Administration, collected \$10,800 in earnings while collecting \$21,298 in 12 pension checks. This pensioner appears to have violated New York City Charter §1117 because he received disability payments and earnings through New York public service of more than \$1,800, and did not suspend pension payments during the time of such re-employment. As a result, this pensioner may have improperly received four pension payments that totaled \$7,109 during Calendar Year 2014.

Recommendations

NYCERS officials should:

1. Investigate the NYCERS pensioner identified in this report and recoup any overpayments of pension funds they received in violation of State or City law.

NYCERS Response: “We have investigated the pensioner cited who was working as a consultant for the City of New York and determined that this retiree was retired under disability pursuant to §605 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 \$10,800 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.”

Auditors’ Comment: On June 27, 2005 and April 21, 2006, the Comptroller’s General Counsel’s Office issued opinions concerning NYCERS’ Personal Service Income policy (see Appendix I). In the subsequent opinion dated April 21, 2006, the Comptroller’s Counsel specifically reviewed the Law Department’s opinion dated December 9, 2005. In these opinions, Office of the 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 21, 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 its service retirees under the age of 65 and to all disability retirees that clearly state the applicable income limitations and the retirees’ responsibilities regarding compliance with public service re-employment law.

NYCERS 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.”

DETAILED SCOPE AND METHODOLOGY

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. 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 of the New York City Administrative Code, the Comptroller is a member of Board of Trustees of NYCERS, POLICE, FIRE, and TRS. The Comptroller sits on the boards of these retirement systems through a representative. Neither the Comptroller nor his representative on each board were involved in the audit process.

The scope period of this audit was Calendar Year 2014. We met with each pension system's 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),⁴
- member records from all five retirement systems, and
- waiver information from the three authorized agencies who may issue waivers for retirees: New York State Civil Service Commission, New York City Department of Citywide Administration, and City University of New York.⁵

To determine the accuracy of the PPMS members' information, we compared the members' social security numbers and birthdates with the data provided by each retirement system. We then eliminated the pensioners who were over or turning 65 in 2014. We identified 90,356 pensioners who were under age 65 during Calendar Year 2014 and received payments through PPMS.

We then matched the 90,356 New York City pensioners against the non-employee compensation listed on the Form 1099-MISC.⁶ This matching process identified individuals who:

- collected a pension from one of the five New York City retirement systems during Calendar Year 2014; and
- had received consultant payments from the City.

⁴ The information was provided by Financial Information Services Agency (FISA), which is the custodian of the City's Pension Payroll Management System.

⁵ According the Personnel Rules and Regulations of the City of New York, Department of Citywide Administration Services 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.

⁶ A separate audit report has been issued for each of the five New York City retirement systems for the retirees who were re-employed by the City after retirement; the other five audits are FN15-082A (TRS), FN15-083A (POLICE), FN15-084A (BERS), FN15-085A (NYCERS), and FN15-086A (FIRE). In addition, we have conducted Calendar Year 2014 matches of retirees who were re-employed by State agencies; the results of this match are covered in a separate report (Audit #FN15-087A)

Based on our review of the data, we identified 51 individuals who were either service retirees who retired prior to January 1, 2014, and received more than \$30,000 in consultant payments during 2014, or disability retirees who received more than \$1,800 in pension payments and consultant payments from the City during 2014. We then excluded the service retirees who either had waivers that covered Calendar Year 2014 as required by RSSL §211-§212 or had their pensions suspended at the appropriate times as required by NYC Charter §1117.

We took the following steps for the two pensioners we found:

- obtained additional detailed information about their individual pension and consultant payments;
- analyzed the timing that the individual received consultant payments from the City (if available); and
- contacted retirement system representatives, who assisted us in searching the pensioner's file for waivers and other relevant information (if any).

For the remaining pensioner who appeared to lack valid reasons for receiving both pension and consulting-service payments, we calculated the apparent pension overpayments based on our analyses of when the pensioner reached the legal earnings limit of \$1,800 in pension payments and public service consulting earnings for disability retirees. 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 excluded from the overpayments cited in this report.



Allen Fitzer
Deputy General Counsel

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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)

Gary Rose
B. Anthony Scully
June 27, 2005
Page 2.

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.



May 12, 2016

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

**Audit Report FN15-088A
Pensioners Working as
Consultants for the City after
Retirement
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 NYCERS pensioner identified in this report and recoup any overpayments of pension funds this pensioner received in violation of State or City Law.*

Response

We have investigated the pensioner cited who was working as a consultant for the City of New York and determined that this retiree was retired under disability pursuant to §605 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 \$10,800 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 the applicable income limitations and the retirees' responsibilities regarding compliance with public service reemployment.*

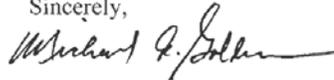
Response

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.

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



MICHAEL A. CARDOZO
Corporation Counsel

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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 *IV*
Chief, Pensions Division

Susan Sanders *SS*
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.



**BOARD OF EDUCATION RETIREMENT SYSTEM
OF THE CITY OF NEW YORK
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BROOKLYN, NEW YORK 11201- 4965**

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May 16, 2016

Ms. Marjorie Landa
Deputy Comptroller for Audit
Bureau of Audit
1 Centre Street, Room 1100
New York, NY 10007-2341

**Re: Audit Report on New York City Pensioners
Working as Consultants for the City after Retirement
January 1, 2014-December 31, 2014
FN15-088A**

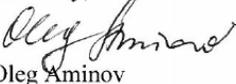
Dear Ms. M. Landa:

We are in receipt of the draft audit report dated May 9, 2016 on New York City Pensioners Working as Consultants for the City after Retirement during the period January 1, 2014 through December 31, 2014. For the period under consideration, you did not identify any pensioner of the Board of Education Retirement System (BERS) as being re-employed, in violation of RSSL §211 and §212 or New York City Charter §1117.

Although you provided no recommendation, please be advice that special reminder is included each year in BERS WORDS, which is a publication sent to all BERS members including all retirees. The SPD can be found on the BERS website. Additionally, BERS provides notification to the new retirees of their responsibilities regarding public service re-employment.

BERS is committed to ensuring that retirees are in compliance with State and City laws and regulations. We thank the Comptroller for his vigilance and efforts to enhance our operations. If you have any questions, or concerns about our responses, please let us know.

Sincerely,


Oleg Aminov
Internal Auditor

Cc: Sanford Rich
John Cahalin



FIRE DEPARTMENT

9 METROTECH CENTER - ROOM 85-17 BROOKLYN, NEW YORK 11201-3857

RAY SAYLOR
DEPUTY DIRECTOR, INTERNAL AUDIT & CONTROL



May 11, 2016

Ms. Marjorie Landa
Deputy Comptroller for Audit
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1 Centre Street
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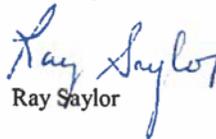
Re: Audit Report on New York City Pensioners Working as Consultants for the City after Retirement. January 1, 2014 – December 31, 2014. FN15-088A.

Dear Ms. Landa:

The above audit did not find any individuals who received pension payments during 2014 that appear to violate applicable sections of State and City laws, hence no recommendations were made. Please thank your audit staff for the assistance they have provided to the Department in this review.

If you wish to discuss any portion of our response, please contact me at (718) 999-1728.

Sincerely,


Ray Saylor

cc: Kat Thomson, Assistant Commissioner
Domenick Loccisano, Executive Director