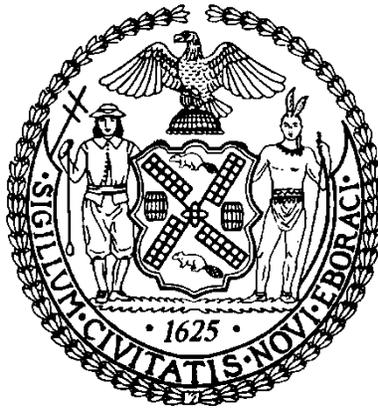


**CITY OF NEW YORK
OFFICE OF THE COMPTROLLER**

**John C. Liu
COMPTROLLER**

BUREAU OF FINANCIAL AUDIT

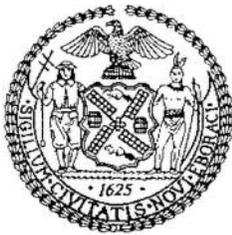
**H. Tina Kim
Deputy Comptroller for Audit**



**Audit Report on New York City Pensioners
Working for New York State After Retirement
January 1, 2008–December 31, 2008**

FL10-119A

June 30, 2010



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

John C. Liu
COMPTROLLER

June 30, 2010

To the Residents of the City of New York:

My office has audited the five New York City retirement systems to identify New York City pensioners who may be reemployed by New York State and illegally collecting a pension from a New York City retirement system—known as “double-dippers” or “disability violators”—and to quantify the amounts of any improper payments to individuals who appear to be violators of New York State Retirement and Social Security Law (RSSL) §211 and §212 or New York City Charter §1117 during calendar year 2008. Audits such as this provide a means of ensuring that pensioners are complying with all laws pertaining to public service reemployment and that appropriate steps are taken to recoup improper payments to individuals after retirement.

The audit found 16 individuals who received \$296,202 in pension payments during 2008 that appear to violate applicable sections of State and City laws. These individuals were in apparent violation of RSSL §211 or §212 because they were under age 65 and received excess State wages above the limitations without having a waiver on file at one of the five City retirement systems, or were in violation of §1117 of the New York City Charter because they were collecting disability pensions while earning more than \$1,800 a year (including pension payments) at a New York State agency.

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

The results of the audit have been discussed with officials from the five New York City retirement systems, and their comments have been considered in preparing this report. Their complete response is attached to this report.

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

Sincerely,

A handwritten signature in black ink, appearing to read "John C. Liu".

John C. Liu

Table of Contents

AUDIT REPORT IN BRIEF

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

INTRODUCTION..... 3

Background.....3
Objective.....6
Scope and Methodology.....6
Discussion of Audit Results8

FINDINGS10
Overpayment of Pension Benefits.....10

RECOMMENDATIONS..... 12

APPENDIX I Summary of 2008 Overpayments

APPENDIX II 2008 Pension Overpayments, New York City Police
Department Pension Fund, Service Retirees

APPENDIX III 2008 Pension Overpayments, New York City Police
Department Pension Fund, Disability Retirees

APPENDIX IV 2008 Pension Overpayments, New York City Teachers’
Retirement System, Service Retirees

APPENDIX V 2008 Pension Overpayments, New York City Teachers’
Retirement System, Disability Retirees

APPENDIX VI 2008 Pension Overpayments, New York City
Employees’ Retirement System, Disability Retirees

APPENDIX VII Reemployed NYC Pensioners, Total by
Current Employer

ADDENDUM I Police Department Pension Fund Response

ADDENDUM II Teachers’ Retirement System Response

ADDENDUM III NYC Employees’ Retirement System Response

ADDENDUM IV Fire Department Pension Fund Response

ADDENDUM V Board of Education Retirement System Response

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

**Audit Report on New York City Pensioners
Working for New York State after Retirement
January 1, 2008—December 31, 2008**

FL10-119A

AUDIT REPORT IN BRIEF

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

Audit Findings and Conclusions

The audit found 16 individuals who received \$296,202 in pension payments during 2008 that appear to violate applicable sections of State and City laws. These individuals were in apparent violation of RSSL §211 or §212 because they were under age 65 and received excess State wages above the limitations without having a waiver on file at one of the five City retirement systems, or were in violation of §1117 of the New York City Charter because they were collecting disability pensions while earning more than \$1,800 a year (including pension payments) at a New York State agency. Four of the 16 individuals were cited in prior audit reports.

Audit Recommendations

The audit made four recommendations, that New York City retirement systems officials should:

- Investigate those individuals identified as receiving pensions while being reemployed in New York State public service. City retirement system officials should also commence prompt recoupment action against those individuals found to be illegally collecting pensions.

- Forward to the Department of Investigation, if the circumstances warrant such action, the names of those individuals found to be illegally collecting pensions.
- Ascertain whether previous pension overpayments have been recouped and whether current pensions have been suspended for those individuals who have been cited in previous audits as “double-dippers” or “disability violators.”
- Send special reminders to service retirees under the age of 65 and to all disability retirees that clearly state their responsibilities regarding public service reemployment.

INTRODUCTION

Background

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

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

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

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

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

An exception to this restriction is provided by RSSL §212, which permits a service retiree to be reemployed in New York public service if the retiree earns no more than the amount prescribed by that section and files a “Section 212 Statement of Election” with his or her retirement system (see below). For calendar year 2008, the earnings limitation does not apply after the retiree reaches the age of 65.

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

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

This report includes New York City pensioners from the above retirement systems.

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

Disability retirees are not subject to RSSL §211 and §212. However, the New York City Administrative Code, the New York State Education Law, and the New York City Charter (§1117) provide for the reemployment of New York City disability retirees in New York State public service. The following regulations are applicable to each of the five New York City retirement systems:

TRS

The New York City Administrative Code (Volume 3, Title 13, Chapter 4, §13-553) combined with the New York City Charter (§1117), prohibits a TRS disability retiree from earning more than \$1,800 a year (including pension payments) in New York public service, unless the retiree's disability pension is suspended during the time of such employment.

POLICE

The New York City Administrative Code (Volume 3, Title 13, Chapter 2, §13-254), provides for the reemployment of New York City Police Department disability retirees in New York public service. These provisions (also known as "Disability Safeguards") apply up to only the minimum period for service retirement elected by the employee (usually 20 years, but 25 years may be elected), subject to the following conditions: (1) the retiree undergoes a medical examination, (2) the Board of Trustees of the retirement system agrees with the medical board report and certification of the extent to which the retiree is able to work (the Board must then place the retiree's name on a civil service list as a "preferred eligible"), and (3) the Board reduces the retiree's pension to an amount which, when added to the retiree's salary, does not exceed the current maximum salary for the next higher title than that held by the person at retirement.

After the minimum (20- or 25-year) period for service retirement has expired, disability retirees in New York City are subject to the New York City Charter §1117, which prohibits a

retiree from earning more than \$1,800 a year (including pension payments) in New York public service unless the retiree's disability pension is suspended during the time of such employment.

FIRE

The New York City Administrative Code (Volume 3, Title 13, Chapter 3, §13-356 and §13-357), provides for the reemployment of New York City Fire Department disability retirees in New York public service. These provisions (also known as "Disability Safeguards") apply up to only the minimum period for service retirement elected by the employee (usually 20 years, but 25 years may be elected), subject to the following conditions: (1) the retiree undergoes a medical examination, (2) the Board of Trustees of the retirement system agrees with the medical board report and certification of the extent to which the retiree is able to work (the Board must then place the retiree's name on a civil service list as a "preferred eligible"), and (3) the Board reduces the retiree's pension to an amount which, when added to the retiree's salary, does not exceed the current maximum salary for the next higher title than that held by the person at retirement.

After the minimum (20- or 25-year) period for service retirement has expired, disability retirees in New York City are subject to the New York City Charter §1117, which prohibits a retiree from earning more than \$1,800 a year (including pension payments) in New York public service unless the retiree's disability pension is suspended during the time of such employment.

BERS

The New York State Education Law (Title 2, Article 52, §2575), combined with the New York City Charter (§1117), prohibits a New York City Department of Education non-pedagogical disability retiree from earning more than \$1,800 a year (including pension payments) in New York public service, unless the retiree's disability pension is suspended during the time of such employment.

NYCERS

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

After the minimum period for service retirement has expired, disability retirees in New York City are subject to the New York City Charter §1117, which prohibits a retiree from earning more than \$1,800 a year (including pension payments) in New York public service, unless the retiree's disability pension is suspended during the time of such employment.

With regard to disability retirees of the five City retirement systems, waivers superseding the above provisions may not be granted.

Objective

The objective of this audit was to identify any New York City pensioners who may be reemployed by New York State and illegally collecting a pension from a New York City retirement system—known as “double-dippers” or “disability violators”—and to quantify the amounts of any improper payments to individuals who appear to be violators of RSSL §211 and §212 or New York City Charter §1117 during calendar year 2008.

Scope and Methodology

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

We are issuing a modified GAGAS compliance statement because of the Comptroller's mandated non-audit responsibility in connection with the retirement system boards for NYCERS, POLICE, FIRE, and TRS. In accordance with §13-103, §13-202, §13-302, and §13-507 of the New York City Administrative Code, and §2575 of the New York State Education Law, Boards of Trustees head NYCERS, POLICE, FIRE, and TRS. The Comptroller is one of the trustees of NYCERS, POLICE, FIRE, and TRS. The Comptroller is represented on each of these Boards by a designee. The Comptroller's designee was not involved in planning or conducting this audit, or in writing or reviewing this audit report. Accordingly, we feel that the above issue has had no impact on the objectivity of this audit, or on the conclusions and associated findings disclosed in this report.

Our audit period was January 1, 2008, through December 31, 2008. We met with officials of the five New York City retirement systems (TRS, POLICE, FIRE, BERS, and NYCERS) to review their monitoring processes for individual pensioners.

To discover the extent to which retired New York City employees were being improperly reemployed by New York State agencies, the New York State Bureau of Payroll Audit (Office of

the State Comptroller, Albany) performed a computer match of the approximately 277,049 New York City pensioners against a listing of all New York State workers (approximately 355,000) who received a W-2 wage statement for the year 2008.¹ This matching process identified 319 individuals under age 65 who either received more than \$30,000 in 2008 (service retirees) or \$1,800 in 2008 (disability retirees). These individuals were then sorted by retirement system and investigated to determine the reasons those individuals received a pension check and a payroll check concurrently.

Among the valid reasons individuals received both pension checks and payroll checks are the following: some had been granted waivers; some had their pensions suspended at the appropriate times; and some were not actually employed during 2008, but instead received lump-sum payments for accrued vacation and sick leave or for having selected an early retirement program that provided subsequent cash payments in 2008. Because of the magnitude of the task, we did not match the retirees against the other New York City, New York State, and local government employees paid by municipalities, counties, and systems other than those integrated with the State or FISA.

Of the 319 matches, 193 were individuals collecting POLICE pensions, 76 were individuals collecting TRS pensions, 39 were individuals collecting NYCERS pensions, 10 were individuals collecting FIRE pensions, and 1 individual was collecting a BERS pension. For the 319 individuals from POLICE, NYCERS, TRS, FIRE, and BERS we:

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

Initial investigations eliminated 303 of these 319 individuals. The remaining 16 individuals appeared to lack valid reasons for being on both lists. Of the 16 individuals, 7 are service retirees and 9 are disability retirees. The total amount of improper pension payments is \$296,200 consisting of \$79,934 in improper pension payments to service retirees and \$216,266 in improper pension payments to disability retirees.

¹ This audit report is exclusive of the five separate audit reports of New York City pensioners working for New York City after their retirement in 2008: the five audits of City workers are FL10-114A (FIRE), FL10-115A (BERS), FL10-116A (TRS), FL10-117A (NYCERS), and FL10-118A (POLICE).

The breakdowns for the five New York City retirement systems are as follows:

<u>Retirement System</u>	<u>Service Retirees</u>	<u>Disability Retirees</u>	<u>Total Retirees</u>	<u>Improper Pension Payments</u>
POLICE	2	5	7	\$ 190,326
TRS	5	1	6	\$ 79,864
NYCERS	<u>0</u>	<u>3</u>	<u>3</u>	<u>\$ 26,012</u>
Total	<u>7</u>	<u>9</u>	<u>16</u>	<u>\$ 296,202</u>

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

In addition, we followed up on the implementation status of the recommendations from last year's audit report—*New York City Pensioners Working for New York State after Their Retirement January 1, 2007—December 31, 2007*, FL09-121A, issued June 30, 2009—by reviewing correspondence provided by POLICE, NYCERS, and TRS. We also intended to follow up on the implementation status of the recommendations from last year's audit reports for FIRE and BERS. However, last year's reports made no recommendations to FIRE and BERS because the audit did not identify any pensioners who received 2007 pension payments that appeared to violate applicable sections of state or City laws.

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 those officials on May 10, 2010, and discussed at exit conferences on May 25, 2010, and May 26, 2010. BERS, FIRE, and NYCERS officials elected to waive their exit conference. We submitted a draft report to the five City retirement systems with a request for comments. Each of the five retirement systems provided separate responses, which are summarized as follows:

POLICE Response: On June 14, 2010, we received a response from the POLICE Executive Director, in which he described the actions POLICE has taken to address the report's recommendations.

TRS Response: On June 24, 2010, we received a response from the TRS Deputy Director, stating, “Please be advised that the Teachers’ Retirement System (TRS) is in full compliance with all your recommendations.”

NYCERS Response: On June 22, 2010, we received a response from the NYCERS Director of Finance, in which he agreed with the audit’s recommendations. However, the Director contends that the three NYCERS pensioners cited in this report were retired under disability pursuant to §507a or §605 of the Retirement and Social Security Law (RSSL), and were not in violation, as NYCERS Personal Service Income Limitation was \$26,000 for calendar year 2008.

FIRE Response: On June 21, 2010, we received a response from the FIRE Chief Compliance Officer, in which he either agreed to implement or stated that FIRE was already in the process of implementing the report’s recommendations.

BERS Response: On June 22, 2010, we received a response from the BERS Director of Operations, stating, “We agree with your conclusions and though no violators have been found in this audit, we will continue to be vigilant in seeking total adherence to the aforementioned laws.”

The full texts of these responses are included as addenda to this report.

FINDINGS

Overpayment of Pension Benefits

This audit identified 16 individuals who received \$296,202 in pension payments during 2008 that appear to violate applicable sections of State and City laws. (See Appendices I through VII for the agency summaries and detailed listings of the 16 pensioners and their current employers.) Four of the 16 individuals were cited in prior audit reports.

As stated previously, we identified 16 pensioners who were in apparent violation of RSSL §211 or §212 because they were under age 65 and received excess State wages above the limitations without having a waiver on file at one of the five City retirement systems, or were in violation of §1117 of the New York City Charter because they were collecting disability pensions while earning more than \$1,800 (including pension payments) a year at a New York State agency and were past their applicable anniversary dates. These 16 individuals received improper pension payments of \$296,202 as follows:

	<u>Number of Individuals</u>	<u>Total Improper Payments</u>
2008 §211/212 Violators	7	\$ 79,934
2008 §1117 Violators	<u>9</u>	<u>216,268</u>
Total	<u>16</u>	<u>\$ 296,202</u>

Our total represents the amount of improper 2008 pension payments based on an analysis of when the reemployed pensioners reached the legal earnings limitations of (\$30,000 for service retirees and \$1,800 for disability pensioners). Allowances were made for those retirees who worked only part of that year. Moreover, the annuity portions of the pension payments, if any, that are not affected by RSSL §211 or §212 were not excluded; rather, they were estimated to be less than five percent of the total calculated payments. The exact annuity portion, if any, for each individual can be determined only by City retirement systems officials. Immediate action by the five City retirement systems and employing State agencies is needed to investigate and recoup, when appropriate, any improper payments made to those retirees identified as possible “double-dippers.” (The applicable employing agencies involved in this audit appear in Appendix VIII.)

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

CASE #1, POLICE: A Police Officer, who retired in July 2006 on a disability pension, collected 12 pension checks (one each month) in calendar year 2008, totaling \$47,720. This individual worked for the Police Department and the New York State Senate Fiscal Office for eleven months (January through November) and collected a salary of \$62,770.

This individual became a member of the Police Department in 1986 and therefore does not qualify for “Disability Safeguards” provisions beyond 2006. Accordingly, any earnings above \$1,800 for 2008 make the disability pension payments for the year improper. Therefore, it appears that ten pension checks (February through November) totaling \$38,730 may have been improperly received and cashed in 2008.

The following is an example of a TRS service retiree who was found to be working at a State agency during calendar year 2008:

CASE #2, TRS: A teacher, who retired in January 2004, collected 12 pension checks (one for each month) in calendar year 2008, totaling \$88,798. At the same time, this individual worked for multiple schools for eleven months in 2008 (January through May, and July through December) and collected a salary of \$43,152. We found no evidence of a waiver for this individual for any portion of 2008. On October 3, 2008, this person’s cumulative salary earnings for the year exceeded the \$30,000 limit for service retirees. Therefore, it appears that two pension checks (November and December) totaling \$14,800 may have been improperly received and cashed in calendar year 2008

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

CASE #3, NYCERS: A Correction Officer, who retired in July 1997 on a disability pension, collected 12 pension checks (one each month) in calendar year 2008, totaling \$16,070. At the same time this individual worked for Queens College for eleven months (February through December) and collected a salary of \$11,520. This individual became a member of NYCERS in 1981 and therefore does not qualify for “Disability Safeguards” provisions beyond 2001. Accordingly, any earnings above \$1,800 for 2008 make the disability pension payments for the year improper. Therefore, it appears that ten pension checks (March through December) totaling \$13,410 may have been improperly received and cashed in 2008.

It should be noted that in their correspondence concerning the implementation status of the recommendations from last year’s audit of 2007, POLICE, NYCERS, TRS, FIRE, and BERS officials advised us that they have implemented or were in the process of implementing the report’s recommendations. It should be noted that last year’s report made no recommendations to FIRE and BERS because the audit did not identify any pensioners who received 2007 pension payments that appeared to violate applicable sections of state or City laws.

RECOMMENDATIONS

Officials of the New York City retirement systems should:

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

Agency Responses: POLICE and FIRE agreed with this recommendation.

BERS did not address this recommendation. However, the Director of Operations stated, “We agree with your conclusions, and though no violators have been found in this audit, we will continue to be vigilant in seeking total adherence to the aforementioned laws.”

The NYCERS Director of Finance stated, “We have investigated the three (3) pensioners cited who were employed by the State of New York and determined the following:

- Two (2) pensioners were retired under disability pursuant to §507a of the Retirement and Social Security Law (RSSL), and were not in violation, as the Personal Service Income Limitation was \$26,000 for calendar year 2008 and these two pensioners earned \$11,520 and \$9,309.
- One (1) pensioner was retired under disability pursuant to §605 of the RSSL and was not in violation, as the Personal Service Income Limitation was \$26,000 for calendar year 2008 and the pensioner earned \$10,192.

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

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

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

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

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

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

Agency Response: The TRS Deputy Director stated, “TRS had five (5) ‘NYC Pensioners Working for the New York State after Retirement’ in 2008 that remain over the EAR limit of \$30,000.

“For three (3) of the pensioners TRS had no reported wages on file. TRS have sent correspondences to those pensioners explaining that their earnings must be corroborated and within EAR limits to avoid suspension.

“Additionally, two (2) pensioners were under the EAR limit, one pensioner actual earnings was under \$30,000; the other pensioner repaid the excess earnings.”

Auditor Comment: While we are pleased that TRS has investigated the cited pensioners, we disagree with TRS’s contention that one pensioner’s actual earnings were under \$30,000. For this pensioner, we made allowances in our overpayment calculations for: termination pay; lump-sum payments for accrued vacation and sick leave; subsequent payments related to early retirement programs that provided subsequent cash payments in 2008; and contractual retro payments, but this pensioner still exceeded the \$30,000 limitation.

We also disagree with TRS’s contention that pensioners who repay their employer all earnings in excess of the \$30,000 income limitation are in compliance with RSSL, §210 through §216. Specifically RSSL states that, any service retiree earning more than \$30,000 in 2008 should have received a §211 waiver to prevent suspension of the retirement allowance. RSSL does not make any exceptions related to the repayment of excess earnings to their employers.

Therefore, we maintain that all five individuals cited in this report were in apparent violation of RSSL §211 or §212, or the New York City Charter §1117 and should be required to repay the amount of improper payments they received.

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

Agency Responses: POLICE, TRS, NYCERS, and FIRE agreed with this recommendation.

BERS did not address this recommendation.

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

Agency Responses: POLICE, TRS, NYCERS, and FIRE agreed with this recommendation.

BERS did not address this recommendation.

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

Agency Responses: POLICE, TRS, NYCERS, and FIRE agreed with this recommendation.

BERS did not address this recommendation.

APPENDIX I
SUMMARY OF 2008 OVERPAYMENTS

	<u>SERVICE</u>		<u>DISABILITY</u>		<u>TOTAL</u>	
	Persons	Amount	Persons	Amount	Persons	Amount
POLICE	2	\$39,939	5	\$150,387	7	\$190,326
TEACHERS	5	39,995	1	39,869	6	79,864
NYCERS	0	0	3	26,012	3	26,012
TOTAL	<u>7</u>	<u>\$79,934</u>	<u>9</u>	<u>\$216,268</u>	<u>16</u>	<u>\$296,202</u>

APPENDIX II
2008 PENSION OVERPAYMENTS - NYC POLICE DEPARTMENT PENSION FUND
SERVICE RETIREES

Pension Number	Date Retired	2008 Pension	Months Overpaid	Amount Overpaid	2008 Employer	Payroll Code	2008 Salary	Waiver Issuing Agency	Waiver in 2008
P-036059-0	1/16/1989	\$31,679	8	\$21,159	DEPT OF LABOR	14020	\$95,327	NYSCSC	NO
P-061974-0	4/13/2007	37,560	6	18,780	DEPT OF MILITARY	1072	50,940	NYSCSC	NO

Total Individuals: 2

Total: \$ 39,939

Notes:

DEPT OF LABOR

Department of Labor

DEPT OF MILITARY

Department of Military & Naval Affairs

NYSCSC

New York State Civil Service Commission

**APPENDIX III
2008 PENSION OVERPAYMENTS - POLICE PENSION FUND
DISABILITY RETIREES**

Pension Number	Date Retired	2008 Pension	Months Overpaid	Amount Overpaid	2008 Employer	Payroll Code	2008 Salary	Disability Safeguards
Case # 1 P-060702-0	7/31/2006	\$47,720	10	\$38,730	POLICE DEPT/ NYS SENATE	56/4000	\$62,770	NO
*P-021976-0	10/20/1982	42,876	11	39,310	OFF OF PARKS/ LONG ISLAND	49220	12,456	NO
P-062389-0	6/30/2007	73,320	DS	30,871	POLICE DEPT/ OFFICE OF COURT ADMIN	56/5607	66,011	YES
*P-022920-0	7/4/1983	31,578	11	28,954	OFF OF PARKS/ PALISADES INTERSTATE	49059	24,244	NO
P-059018-0	12/31/2005	98,102	DS	12,522	POLICE DEPT/ BANKING DEPT	56/7000	12,688	YES

Total Individuals: 5

Total: \$150,387

Notes:

POLICE DEPT	Police Department
NYS SENATE	New York State Senate/ Fiscal Office
OFF OF PARKS/ LONG ISLAND	Office of Parks & Recreation - Long Island Park Commission
OFF OF PARKS/ PALISADES INTERSTATE	Office of Parks & Recreation - Palisades Interstate Park Commission
OFFICE OF COURT ADMIN	Office of Court Administration - NYC Civil Court
BANKING DEPT	New York State Banking Department

*These individuals were cited in our prior audits for calendar years 2006 and 2007.

**APPENDIX IV
2008 PENSION OVERPAYMENTS - NYC TEACHERS' RETIREMENT SYSTEM
SERVICE RETIREES**

Pension Number	Date Retired	2008 Pension	Months Overpaid	Amount Overpaid	2008 Employer	Payroll Code	2008 Salary	Waiver Issuing Agency	Waiver in 2008
Case #2 U-022293-0	1/27/04	\$88,798	2	\$14,800	COMMUNITY CO / QUEENS COLLE	464, 70041	\$43,152	CUNYC	NO
U-709078-0	7/1/01	65,339	2	10,625	CUNYCC KINGS / BROOKLYN COL	465, 70010, 70011	31,549	CUNYC	NO
U-728700-0	7/1/05	91,589	1	6,679	DOE / BROOKLYN COL	70011, 746	34,458	CUNYC/DOEC	NO
U-731193-0	7/1/06	40,878	2	6,630	QUEENS COLLE / BOARD OF EDU	70040, 70041, 742	52,495	CUNYC/DOEC	NO
U-029469-0	7/1/05	7,568	2	1,261	NYC CRIMINAL	5617	42,359	CAC	NO

Total Individuals: 5

Total: \$ 39,995

NOTES:

CUNYCC KINGS	CUNY - Kingsboro Community College
COMMUNITY CO	Community College (Queensboro)
BROOKLYN COL	CUNY - Brooklyn College
QUEENS COLLE	CUNY - Queens College
BOARD OF EDU	Board of Education
NYC CRIMINAL	Office of Court Administration-NYC Criminal Court Human Resources Payroll Division
DOE	Department of Education
DOEC	Department of Education Chancellor
CAC	Chief Administrator of Courts
CUNYC	City University of New York Chancellor

APPENDIX V
2008 PENSION OVERPAYMENTS - NYC TEACHERS' RETIREMENT SYSTEM
DISABILITY RETIREES

Pension Number	Date Retired	2008 Pension	Months Overpaid	Amount Overpaid	2008 Employer	Payroll Code	2008 Salary
*T-784437-0	6/12/992	\$ 60,635	8	\$39,869	Brooklyn College/College of Staten Island	70011/70101	\$ 6,454

Total Individual(s): 1 **Total:** \$ 39,869

Notes:

Brooklyn College City University of New York [CUNY] - Brooklyn College Adjunct
College of Staten Island City University of New York [CUNY] - College of Staten Island Adjunct

*This individual was cited in our prior audit for calendar year 2007.

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

Pension Number	Date Retired	2008 Pension	Months Overpaid	Amount Overpaid	2008 Employer	Payroll Code	2008 Salary	Disability Safeguards (DS)
Case # 3 N-309008-0	7/28/1997	\$16,070	10	\$13,410	QUEENS COLLEGE	70042	\$11,520	NO
*N-302457-0	11/23/1992	14,429	10	12,041	CORRECTIONAL	10160	9,309	NO
N-346907-0	8/8/2007	8,968	1	561	HUNTER COLLE	70030	10,192	NO

Total Individuals: 3

Total: \$ 26,012

Notes:

QUEENS COLLEGE
CORRECTIONAL
HUNTER COLLE

CUNY - Queens College Hourly
Department of Correctional Services/ State Office Campus
CUNY - Hunter College

* This individual was also cited in our prior audits for calendar year 2006 and 2007.

**RE-EMPLOYED NYC PENSIONERS
TOTAL BY CURRENT EMPLOYER**

<u>Current State Employer</u>	<u>Payroll Code</u>	<u>Individuals Paid under Code</u>			<u>TOTAL</u>
		<u>NYCERS</u> 2008	<u>TRS</u> 2008	<u>POLICE</u> 2008	
Police Department	56			3	3
Community College (Queensboro)	464		1		1
Community College (Kingsboro)	465		1		1
Board of Education - Pedagogical	742		1		1
Board of Education - Per Diem Teachers	746		1		1
Department of Military & Naval Affairs	1072			1	1
New York State Senate/ Fiscal Office	4000			1	1
Office of Court Administration-NYC Civil Court	5607			1	1
Office of Court Administration-NYC Criminal Court Human Resources Payroll Division	5617		1		1
New York State Banking Department	7000			1	1
Department of Correctional Services	10160	1			1
Department of Labor	14020			1	1
Office of Parks & Recreation Palisades Interstate Park Commission	49059			1	1
Office of Parks & Recreation Long Island Park Commission	49220			1	1
CUNY - Brooklyn College	70010		1		1
CUNY - Brooklyn College Adjunct	70011		3		3
CUNY - Hunter College	70030	1			1
CUNY - Queens College	70040		1		1
CUNY - Queens College Adjunct	70041		2		2
CUNY - Queens College Hourly	70042	1			1
CUNY College of Staten Island Adjunct	70101		1		1
Total		3	13	10	26



New York City Police Pension Fund

233 Broadway
New York, NY 10279
(212) 693-5100

Anthony J. Garvey
Executive Director

June 14, 2010

H. Tina Kim
Deputy Comptroller
Audits, Accountancy & Contracts
Office of the Comptroller
Executive Offices
1 Centre Street
New York, NY 10007-2341

Re: **Audit Report on New York City
Pensioners working for New York
State after their Retirement
January 1, 2008 – December 31, 2008
FL10-119A**

Dear Ms. Kim:

In regards to the above referenced audit report, the following status report is forwarded.

Recommendation #1

Investigate those individuals identified as concurrently receiving pensions while being re-employed in New York State public service. City retirement system officials should also commence prompt recoupment action against those individuals found to be illegally collecting pensions.

Response

The Police Pension Fund is in total agreement that recoupment of pension benefits received in violation of the law should be commenced immediately.

Regarding the 8 retirees listed by the Comptrollers Office in the June 8, 2010 audit report as possible violators, the Police Pension Fund will investigate all members in question to determine if they are in violation of Section 1117 of the New York City Charter. Those in violation will be given the opportunity to obtain retro-active 211 waivers, as the current law permits. Should such approval be denied, the Police Pension Fund will recover all pension monies received from the period in question.

Recommendation #2

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

Response

The Police Pension Fund concurs with recommendation #2, however, no retiree investigated was deemed appropriate for such a referral.

Recommendation # 3

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

Response

The Police Pension fund has in the past and will continue to suspend or reduce the pension benefit of all identified service or vested interest retirees who elect to continue employment with the State of New York without the benefit of Section 211. Additionally, as noted in our response to previous audits, this fund has recovered well over a million dollars from members of this System identified as violators of these statutes.

Recommendation #4

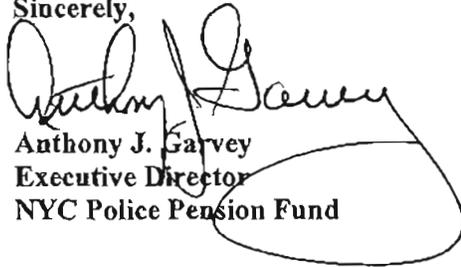
Send special reminders to service retirees under the age of 65 and to all disability retirees that clearly state their responsibilities regarding public service re-employment.

Response

The Police Pension Fund's website provides a special reminder to all retirees with access to the internet and this topic is covered in depth in all retirement seminars conducted by Police Pension Fund personnel as well as in the plan summary description provided to all members. Upon retirement, each member receives the restrictions on employment after retirement in a special handout of the retirement package. In 2010, a letter outlining this policy was prepared and mailed to all NYS retirees and finally, a letter from the NYC Police Pension Fund was sent to the NYC Department of Education requesting that any Police Department retiree seeking employment with the NYC Department of Education be reminded of the statutory restrictions on employment.

I hope this response will aid in the development of a program to insure the integrity of all City Retirement Systems.

Sincerely,



Anthony J. Garvey
Executive Director
NYC Police Pension Fund

AJG:br



Date: June 24, 2010

Ms. Tina Kim
Deputy Comptroller for Audits
1 Centre Street, Room 1100
New York, NY 10007 – 2341

Re: Audit Report on NYC Teachers' Retirement System
New York City Pensioners
Working for New York State after Retirement
January 1, 2008 to December 31, 2008
FL10-119A

Dear Ms. Kim:

Please be advised that the Teachers' Retirement System (TRS) is in full compliance with all your recommendations.

Here is a summary of the remaining EAR cases:

TRS had five (5) "NYC Pensioners Working for the New York State after Retirement" in 2008 that remain over the EAR limit of \$30,000.

For three (3) of the pensioners TRS has no reported wages on file. TRS has sent correspondences to those pensioners explaining that their earnings must be corroborated and within EAR limits to avoid suspension.

Additionally, two (2) pensioners were under the EAR limit: one pensioner's actual earnings were under \$30,000; the other pensioner repaid the excess earnings.

Again, as part of the TRS original audit plan, it is customary for TRS to suspend a member's pension allowance when that member exceeds his/her earnings limitation, as cited under Section RSSL 212, RSSL 211, and NYC Chapter 1117, in an appropriate and timely fashion.

In conclusion, TRS will continue its vigilance in seeking total adherence to the existing laws.

If you have any further questions regarding this status report, please feel free to contact me at (212) 612-5503.

Sincerely,

A handwritten signature in black ink, appearing to read 'Stan Charles', written over a horizontal line.

Stan Charles
Deputy Director
Internal Audit Division

Cc: N. Serrano, P. Raucci, A. Scully, T. Cannady

2008 EAR Audit Report and Accountability

New York City Pensioners Working for New York City after their Retirement										
Pension #	Date Retired	Employer	211 Waiver on file	Pension Benefits	OTC Wages	TRS Wages Earned	Diff	Audit Response	Results	
1	U7352370	9/1/2007	DOE	N	86,341	87,434	37,352	50,082	Member did not exceed Prior year earnings such as termination, vacation, sick or retro payments	ok
2	U0352010	8/21/2007	DOE	N	42,943	46,026	35,501	10,525	Member made payment for excess earnings Prior year earnings such as termination, vacation, sick or retro payments	ok
3	U7263240	9/2/2007	DOE	N	75,725	35,352	31,368	3,984	Member made payment for excess earnings Prior year earnings such as termination, vacation, sick or retro payments	ok
4	U7359410	7/2/2007	DOE	N	66,958	63,943	30,046	33,897	Member did not exceed Prior year earnings such as termination, vacation, sick or retro payments	ok
5	U0192240	7/1/2003	DOE	0	65,528	32,048	33,362	-1,314	Member made payment for excess earnings Prior year earnings such as termination, vacation, sick or retro payments	ok
6	U0177230	7/1/2003	DOE	N	62,027	39,446	22,212	17,234	Member did not exceed Prior year earnings such as termination, vacation, sick or retro payments	ok
7	U0361830	7/1/2007	DOE	N	30,730	32,908	26,850	6,058	Member did not exceed Prior year earnings such as termination, vacation, sick or retro payments	ok
8	U7346940	7/1/2007	DOE	N	78,986	35,954	29,574	6,380	Member did not exceed Prior year earnings such as termination, vacation, sick or retro payments	ok
9	U7353290	7/1/2005	DOE	N	77,322	75,800	33,766	42,034	Member made payment for excess earnings Prior year earnings such as termination, vacation, sick or retro payments	ok
10	U7289810	7/1/2005	DOE	N	67,747	31,569	28,853	2,716	Member did not exceed Prior year earnings such as termination, vacation, sick or retro payments	ok
11	U0353560	7/9/2007	DOE	N	72,608	92,034	34,753	57,281	Member made payment for excess earnings Prior year earnings such as termination, vacation, sick or retro payments	ok

2008 EAR Audit Report and Accountability

New York City Pensioners Working for New York City after their Retirement									
Pension #	Date Retired	Employer	211 Waiver on file	Pension Benefits	OTC Wages	TRS Wages Earned	Diff	Audit Result	Results
12 U7352950	7/1/2007	DOE	N	76,777	34,245	30,153	4,092	Member made payment for excess earnings Prior year earnings such as termination, vacation, sick or retro payments	ok
13 U7353840	7/1/2007	DOE	N	70,842	31,979	29,911	2,068	Member did not exceed Prior year earnings such as termination, vacation, sick or retro payments	ok
14 U0244880	4/1/2004	DOE	N	67,995	32,617	29,696	2,921	Member did not exceed Prior year earnings such as termination, vacation, sick or retro payments	ok
15 U7128110	7/1/2002	DOE	N	72,448	32,566	29,937	2,629	Member did not exceed Prior year earnings such as termination, vacation, sick or retro payments	ok
16 U0338050	5/01/2007	DOE	N	28,705	66,417	41,602	24,815	Member was restored but exceeded member was notified	Pending
17 U0344580	7/1/2007	DOE	N	51,980	48,404	32,332	14,072	Member made payment for excess earnings Prior year earnings such as termination, vacation, sick or retro payments	ok
18 U0359940	10/17/007	DOE	N	16,016	41,286	33,153	8,133	Member did not exceed Prior year earnings such as termination, vacation, sick or retro payments	ok
19 U0302590	5/1/2007	DOE	N	22,039	36,600	35,953	647	Member made payment for excess earnings Prior year earnings such as termination, vacation, sick or retro payments	ok

2008 EAR Audit Report and Accountability

New York City Pensioners Working for New York City after their Retirement- Disability									
Pension #	Date Retired	Employer	211 Waiver on file	Pension Benefits	OTC Wages Earned	IRS Wages Earned	Diff.	Audit Result	Results
1 U0364520	12/3/2007	DOE	N	18,709	12,855	5,434	0	Payments cancelled	OK

New York City Pensioners Working for New York State after their Retirement									
Pension #	Date Retired	Employer	211 Waiver on file	Waiver Period	Pension Benefits	OTC Wages	Wages Earned	Audit Result	Results
1 U0222930	1/27/2004	CUNY	N	N	88,798	43,152	0	Member made payment for excess earnings Prior year earnings such as termination, vacation, sick or retro payments	OK
2 U7090780	7/1/2001	CUNY	N	N	65,339	31,549	0	Member did not exceed Prior year earnings such as termination, vacation, sick or retro payments	OK
3 U7287000	7/1/2005	CUNY	N	N	63,644	34,458	5,509	No payroll records on file- State Member was notified	Pending
4 U7311930	7/1/2006	CUNY	N	N	68,283	52,495	0	No payroll records on file- State Member was notified	Pending
5 U0294690	7/1/2005	CAC	N	N	7,568	42,539	0	No payroll records on file- State Member was notified	Pending

2008 EAR Audit Report and Accountability

New York City Pensioners Working for New York City after their Retirement as a Consultant										
Pension #	Date Retired	Employer	211 Waiver on file	Waiver Period	Pension Benefits	OTC Wages	Wages Earned	Audit Result	Results	
1	9/01/05	5/01/1977	DOE	N	77,439	50,531	0	No payroll records on file- Consultants Member was notified	Pending	
2	7/2/2004	9/08/1982	DOE	28,984	41,288	0	0	No payroll records on file- Consultants Member was notified	Pending	
3	11/2/2002	3/01/1982	DOE	5,367	203,951	0	0	Member is currently suspended for 2007, and will be suspended for 2008	OK	



June 22, 2010

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

**Audit Report FL10-119A
Pensioners Working for the State
Calendar Year 2008**

Dear Ms. Kim,

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

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

Response

We have investigated the three (3) pensioners cited who were employed by the State of New York and determined the following:

- Two (2) pensioners were retired under disability pursuant to §507a of the Retirement and Social Security Law (RSSL), and were not in violation, as the Personal Service Income Limitation was \$26,000 for calendar year 2008 and these two pensioners earned \$11,520 and \$9,309.
- One (1) pensioner was retired under disability pursuant to §605 of the RSSL and was not in violation, as the Personal Service Income Limitation was \$26,000 for calendar year 2008 and the pensioner earned \$10,192.

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

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

Response

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

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

Response

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

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

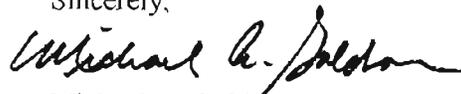
Response

A special notice regarding re-employment after retirement is sent to our pensioners each year in September.

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

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

Sincerely,



Michael A. Goldson
Director, Finance

cc: Diane D'Alessandro, Executive Director, NYCERS



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

MICHAEL A. CARDOZO
Corporation Counsel

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

MEMORANDUM

TO: Karen Mazza
General Counsel, NYCERS

FROM: Inga Van Eysden
Chief, Pensions Division

DATE: October 15, 2004

SUBJECT: Legal Issues

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

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

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



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

MICHAEL A. CARDOZO
Corporation Counsel

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

**CONFIDENTIAL
ATTORNEY-CLIENT
MEMORANDUM**

TO: Diane D'Alessandro
Executive Director
NYCERS

Milton Aron
Deputy Executive Director
NYCERS

FROM: Inga Van Eysden *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.



FIRE DEPARTMENT

9 METROTECH CENTER – ROOM 8S-10

BROOKLYN, NEW YORK 11201-3857

RAY SAYLOR
CHIEF COMPLIANCE OFFICER



June 21, 2010

Ms. H. Tina Kim
Deputy Comptroller
Audits
Office of the Comptroller
1 Centre Street
New York, New York 10007-2341

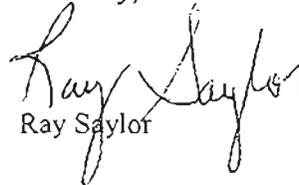
Re: Audit Report on NYC Pensioners Working for New York State After Retirement. January 1, 2008 – December 31, 2008. FL10-119A.

Dear Ms. Kim:

Attached are FDNY's comments on the above mentioned report, as well as our response and Agency Implementation Plan for each of the recommendations. 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 or AIP, please contact me at (718) 999-1728.

Sincerely,


Ray Saylor

cc: Michael Vecchi, Associate Commissioner
Mary Basso, Executive Director 
Domenick Loccisano, Executive Director

Audit FL10-119A

AUDIT RECOMMENDATIONS / FDNY RESPONSE – AGENCY IMPLEMENTATION PLAN

AUDIT RECOMMENDATIONS / FDNY RESPONSE – AGENCY IMPLEMENTATION PLAN

- 1) Investigate those individuals identified as concurrently receiving pensions while being re-employed in New York State public service. City retirement officials should also commence prompt recoupment action against those individuals found to be illegally collecting pensions.

FDNY Response – The above audit did not find any FDNY individuals who violated applicable sections of State and City laws. The Department continues to investigate and take action against those individuals who may be in violation. FDNY has already initiated recoupment proceedings where appropriate.

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

FDNY Response – The above audit did not find any FDNY individuals who violated applicable sections of State and City laws. The Department continues to investigate and take action against those individuals who may be in violation. The Department agrees to notify DOI when circumstances warrant such action.

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

FDNY Response – The Department agrees; all previously identified pension overpayments have already been, or are in the process of being recouped or suspended.

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

FDNY Response – The Department agrees and special reminders on the subject are sent out on a routine basis.



BOARD OF EDUCATION RETIREMENT SYSTEM
OF THE CITY OF NEW YORK
65 COURT STREET
BROOKLYN, NEW YORK 11201- 4965

CHRISTINE BAILEY, EXECUTIVE DIRECTOR

718-935-5400
OUTSIDE NEW YORK STATE
1-800-843-5576

June 21, 2010

John Graham, Deputy Comptroller
Audits, Accountancy & Contracts
1 Centre Street-5th Floor
New York, NY 10007-2341

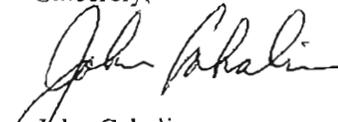
Re: Audit Report on New York City
Pensioners Working for the New York
State After Retirement
January 1, 2008-December 31, 2008
FL10-119A

Dear Mr. Graham:

We are in receipt of your recently issued draft audit report on "New York City Pensioners Working for New York State after Retirement" during the period January 1, 2008 through December 31, 2008. For the period under consideration, you did not identify any retiree of the Board of Education Retirement System (BERS) who were re-employed in violation of the New York State Education Law (Title 2, Article 52, § 2575), and the New York City Charter (§1117), the RSSL §211 and §212.

We agree with your conclusions, and though no violators have been found in this audit, we will continue to be vigilant in seeking total adherence to aforementioned laws. Lastly, we would like to extend our gratitude to you and all parties involved in conducting this audit. Thank you.

Sincerely,


John Cahalin
Director of Operations

cc: Anthony Scully, Bureau of Audit
Board of Trustees
Christine Bailey