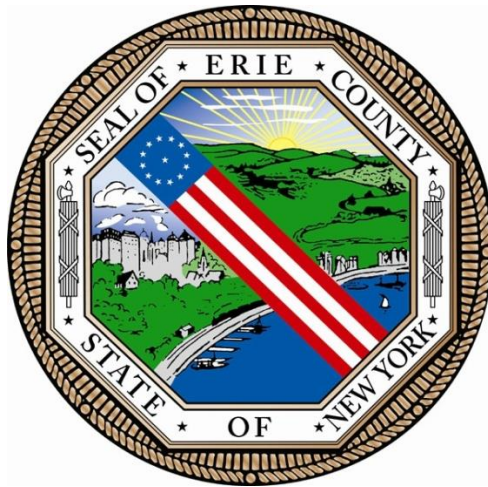


December 2021

A Report on Commissioner of Health's Overtime Payments



STEFAN I. MYCHAJLIW, Jr.
ERIE COUNTY COMPTROLLER

HON. STEFAN I. MYCHAJLIW, Jr.
ERIE COUNTY COMPTROLLER'S OFFICE

**DIVISION OF AUDIT & CONTROL
95 FRANKLIN STREET
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December 28, 2021

Erie County Legislature
92 Franklin Street 4th Floor
Buffalo, New York 14202

Dear Honorable Members:

As you are aware, I have presented you with numerous reports regarding overtime expenditures during the time period that our community has been affected by COVID-19. While reporting on total overtime spending, I have expressed particular concern regarding overtime paid to managerial confidential employees. I have noted that prior to COVID-19, overtime for managerial confidential was rare, with some positions not receiving overtime at all prior to 2020.

This report is different. Rather focusing on overtime payments made globally to Erie County employee, it focuses on the overtime payments made to one particular employee – the Commissioner of Health. Rather than focusing on the propriety and potential waste of excessive overtime, a focus of this report is whether overtime payments are even legal. If the payments were made without a basis in law, possible remedies are proposed to protect taxpayer dollars improperly expended.

Like previous reports, this report serves as an update to previous reports regarding overtime expensed to funds 252, 253 and 110. A meeting scheduled prior to the August, 2020 break to discuss overtime was postponed, with the intent to meet soon for the discussion. To date, this meeting has not yet been rescheduled. I urge that the legislature finally engage in this discussion in 2022, with a preference of sooner over later. This updated information may be useful at such a discussion when it occurs.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Stefan I. Mychajliw, Jr.', with a stylized flourish at the end.

Stefan I. Mychajliw, Jr.
Erie County Comptroller

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Background

On March 25, 2020, the United States Senate passed the “Coronavirus Aid, Relief and Economic Security Act” (CARES) as amended. The United States House of Representatives approved the measure on the following day, and the bill was signed into law on March 27, 2020.

The CARES Act provided significant aid to local governments to combat COVID-19. Erie County received \$160 million in federal funding. Erie County created a special fund to account for expenses permissibly reimbursed by CARES Act governmental funding. The fund is identified as fund 252. The money in fund 252 can be used for various purposes related to combatting COVID-19. These purposes include wages to individuals whose tasks are to substantially address COVID-19, outfitting offices and other areas to reduce potential exposure to COVID-19, fortifying capacity to work remotely to avoid exposure to COVID-19, and supplies and protective gear to guard against COVID-19, to name just a few permissible uses.

As stated, a permissible use of CARES Act funding is to pay employees whose efforts are substantially devoted to addressing COVID-19. As a result, some employees have been hired specifically for such tasks, while others have been authorized overtime for such tasks. The tasks needed to address COVID-19 are varied, and may be different from tasks typically undertaken by employees in their daily activities.

Subsequently, an additional COVID-related spending package named the American Rescue Plan Act of 2021 (ARPA) was approved which will provide Erie County with an additional \$178 million. These funds can be spent on response to the COVID-19 emergency, compensating for lost revenue for governments as the result of COVID-19, and investments in water, sewer and broadband infrastructure.

At the prompting of legislature questions and commentary, our office has previously submitted reports quantifying overtime and holiday worked pay expended to MC employees, overtime and holiday worked pay expended to employees represented by bargaining units, pay for employees who did not report to work and were unable to perform work remotely, the utilization of the imprest fund for expenditures charged to fund 252, and the use of fund 252 for food purchases for individuals quarantining due to COVID-19, as well as employees who report to work. Recommendations were made seeking clarifications to questions raised during the composition of those reports.

This report examines overtime payments to one specific individual – the Erie County Health Commissioner. Previous reports have documented overtime for all employees, which identified the Health Commissioner as the recipient of the highest amount of overtime payments. However, the Health Commissioner may not be entitled to overtime payments. If not, such payments must immediately cease and efforts must be made to address payments made without authority to make such payments.

Overtime Payments to Erie County’s Health Commissioner

Prior to 2020, overtime payments to Erie County’s Health Commissioner were rare. In fact, the Health Commissioner was only paid \$2,075.49 in overtime in 2014. The Health Commissioner did receive payments for monetarily compensated compensatory time, which will be discussed later in this report. Below are payments made to the Health Commissioner in selected categories relevant to this report:

	Budgeted Pay	Holiday Worked 1.5x	OT Payout 1.5x	Comp Time Taken	Comp Buyout	Vacation Buyout	Sick Time Bonus
2012	\$142,548	\$0	\$0	\$10,196	n/a	n/a	
2013	\$150,914	\$0	\$0	\$15,582	n/a	n/a	
2014	\$168,592	\$0	\$2,075	\$19,216	n/a	n/a	\$500
2015	\$181,382	\$0	\$0	\$24,735	n/a	n/a	\$500
2016	\$185,918	\$0	\$0	\$23,908	n/a	n/a	\$500
2017	\$185,205	\$0	\$0	\$15,597	n/a	n/a	\$500
2018	\$192,299	\$0	\$0	\$22,412	n/a	\$5,526	\$500
2019	\$196,625	\$0	\$0	\$15,998	n/a	\$5,650	\$500
2020	\$207,292	\$7,566	\$168,449	\$2,413	n/a	\$5,791	\$500
2021	\$209,044	\$5,809	\$88,577	\$4,460	\$12,165	\$6,082	\$500

Commissioner of Health as an Appointed Official

New York State Public Health Law §351 states that “... the county executive in those counties where the county charter provides that said commissioner is to be appointed by the county executive shall appoint a county health commissioner...” In Erie County, the County Executive did so and the Legislature approved his appointment. As such, it appears that the Erie County Health Commissioner is an appointed position and not a managerial confidential employee. As such, benefits that are applicable to certain managerial confidential employees may not be applicable to the Erie County Health Commissioner.

Regardless of the categorization of the Erie County Health Commissioner for compensation purposes, the same section of New York State Public Health Law that allows the county executive to appoint a county health commissioner also dictates how the county health commissioner is to be compensated.

Specifically, paragraph 6 of that law states that “[t]he county health commissioner or public health director shall receive such compensation as may be fixed by the board of supervisors...” For 2020, the Erie County Legislature approved, or “fixed,” the compensation of the Health Commissioner at the amount recommended by the County Executive, which was \$207,292. For 2021, the Erie County Legislature approved, or “fixed,” the compensation of the Health Commissioner at the amount recommended by the County Executive, which was \$209,044.

Earlier this month, the Erie County Legislature approved, or “fixed,” the compensation of the Health Commissioner for 2022 at the amount recommended by the County Executive, which was \$216,122. The Erie County Legislature did not “fix” any extra payments to the Health Commissioner beyond the payments indicated in the budget.

As such, any amounts paid by Erie County in excess of the amounts fixed by the Legislature may have been contrary to New York State Law. However, as will be discussed later in this report, determining the exact amount of excess payments goes beyond a simple subtraction equation.

It is interesting to note that in letters to the Legislature dated September 22, 2020 and November 30, 2020, I reported to you the amounts overtime paid by Erie County to its managerial confidential employees and its health commissioner, compared to other counties in New York State. As of the September 22, 2020 letter, we reported that at that time, Erie County’s health commissioner had received \$119,485 in overtime payments. Only one other county in New York State reported paying overtime to a health commissioner, for a total of \$3,100. The November 30, 2020 letter updated that not even the five boroughs of New York City paid overtime to MC employees or political appointees. This may have something to do with the parameters set by New York State Public Health Law §351(6).

The federal Fair Labor Standards Act and the New York Minimum Wage Act do create exceptions whereby employees with a fixed compensation must be compensated for overtime worked. However, the Erie County’s Health Commissioner’s annual budgeted pay of \$207,292 in 2020 exceeds the New York State minimum threshold mandating the payment of overtime of \$46,020 by \$161,272, so those exceptions do not apply.

If the Erie County Health Commissioner is indeed an appointed official and has been paid in excess of her compensation as fixed in the Erie County budget, she should be required to repay the excess payments.

Medical Doctor’s Contractual Entitlement to Overtime

As stated above, it appears that the Erie County Health Commissioner is an appointed official. This is a separate category than an MC employee. Although the Health Commissioner is frequently referred to by the administration as an MC employee and is treated in the payroll system as an MC, it is not dispositive as to her legal status. However, even if the Health Commissioner is determined to legally be an MC employee, as opposed to an appointed official, the Health Commissioner may still not be entitled to overtime.

The compensation provided to MC employees tends to mirror the compensation package bargained for by CSEA Local, Erie County Unit 6700, unless specifically stated otherwise elsewhere.

For example, in the CSEA contract in effect for January 1, 2017 through December 31, 2022, CSEA members negotiated annual wage increases of 2.25% in 2018, 2.25% in 2019 and 2.5% in 2020 through 2022. MC employees were given those same raises. Paid Holidays, vacation time accrual, holiday worked, sick time reporting, vacation buyout, bereavement leave, personal leave, cash in lieu of health insurance, receiving pay increments, are just a few of the many provisions negotiated by CSEA which are simply applied to MC employees.

An example of a section of the CSEA contract that does not apply to MC employees concerns the sick time buyout. In 2021 and before, CSEA employees were entitled to \$500 if they used less than eight hours of sick time in the previous year. On January 8, 2021, the policies were changed allowing MC employees to accumulate, and subsequently be paid for, compensatory time earned at the overtime rate. Previously, MC employees could not accrue more than eighty hours of compensatory time. The new policy allows MC employees to accumulate up to 200 hours of compensatory time at the overtime rate, with any existing amount above eighty hours being paid out in the last paycheck of the year. In return for this expanded ability to secure a bonus payment for excess compensatory time, MC employees will no longer be paid the \$500 for not using all of their sick time.

The current CSEA contract was approved by the Legislature on January 18, 2018 (Comm. 2E-26). This contract between Erie County and CSEA Local 815, Erie County Unit 6700, which covers Erie County CSEA employees, states in §16.12, “[e]xceptions to the payment of time and one-half overtime are as follows: 1. Employees who are required to have a Medical Degree.”

The previously mentioned New York State Public Health Law §351 states that the qualifications of the county health commissioner shall be set by sanitary code. NYCRR 10 §11.11 states that a county health commissioner “shall be a physician who is currently registered to practice medicine in New York State....” As such, Erie County’s Health Commissioner is required to have a medical degree.

If the Health Commissioner was a member of the CSEA Local 815, Erie County Unit 6700, she, like the medical doctors that she supervises, would clearly not be entitled to overtime. However, she is not a member of that union. That does not mean that she is entitled to overtime, though. Unlike certain provisions of the CSEA contract that are made non-applicable to MC employees through a formal policy, there is no such overriding of §16.12 for MC employees.

If the CSEA contract provision which prohibits overtime payments for employees whose position requires a medical degree has not been otherwise altered for MC employees, and MC rules mirror those of the CSEA contract unless otherwise addressed, the Erie County Health Commissioner may not be entitled to overtime.

Health Commissioner Overtime Prior to 2020

As outlined above, the Erie County Health Commissioner has been paid a total of \$272,477 in overtime during her tenure as Commissioner, \$270,402 which has been paid over the past two years. In addition, she was paid \$12,165 for a compensatory time buyout, earned at the overtime rate, according to the new policy created on January 8, 2021.

In addition to these amounts, the Erie County Health Commissioner has also been paid \$154,518 for compensatory time taken. These payments are made for time that was worked during a previous pay period and accrued at the overtime rate, but paid out at the normal rate to substitute for time not worked in a subsequent period, akin to a sick or personal day. As such, the full \$154,518 should not be considered overtime. Given that the compensatory time was earned at the overtime rate of 1.5x, only 1/3 of the amount paid should be considered an overtime payment. As such, \$51,106 should be considered overtime payments.

In total, the Erie County Health Commissioner has been paid a total of \$336,148 in overtime during her tenure as Commissioner, of which \$284,857 was paid in 2020 and 2021.

Remedy for Overpayment of Overtime

The Erie County Health Commissioner may have been improperly paid \$336,148 in overtime to which she was not entitled. In cases where employees have been improperly paid in excess of what it was later determined that they were entitled, regardless of whether the fault lied with the employee, a supervisor, the county or someone else, the remedy is repayment of the overpayment.

Of course, the \$336,148 in overpaid overtime is a gross amount. The actual amount repaid by the Health Commissioner should be the net amount actually received.

Further, the amount to be repaid does not need to be repaid in a lump sum, unless that is preferred by the Health Commissioner. A repayment plan could be constructed that would allow the Health Commissioner to repay the amount owed over time, preferably by the scheduled end of her term.

Interest should not be considered for this repayment. There is not a mechanism in law whereby the County can charge interest for repayment of such an error.

Conclusions

The Erie County Health Commissioner may not be entitled to receive overtime payments. New York State Law suggests that she is an appointed official with a fixed compensation, and therefore not entitled to overtime.

Even if the Health Commissioner is not an appointed official and is instead an MC employee, she may not be entitled to overtime. MC compensation tends to mirror CSEA employee compensation. The CSEA contract states that positions requiring a medical degree are not entitled to overtime. The Health Commissioner is required to have a medical degree by New York State law.

In total, the Erie County Health Commissioner has been paid a total of \$336,148 in overtime during her tenure as Commissioner, of which \$289,439 was paid in 2020 and 2021.

If the Erie County Health Commissioner is not entitled to receive overtime payments, this amount must be repaid.

In addition to the immediate effect of overpayment of overtime, such large amounts may have an effect on future pension payments. New York State pensions are based on the average of compensation during the highest three consecutive years.