



MEMORANDUM

TO: Board of Finance of the Town of Fairfield

FROM: Philip C. Pires, Esq., Town Attorney

RE: Severance Pay and Vacation Pay to First Selectwoman, Chief of Staff, and Chief Administrative Officer

DATE: March 28, 2024

At the request of the Board of Finance at its February 20, 2024 meeting, we have researched the history of the Town’s policies on separation compensation and compensation for unused vacation time, specifically, as those policies relate to the First Selectman and Chief of Staff positions. We have included all of the documents referenced herein as backup to this memorandum. With respect to the policies, we have provided them in their original form, and we have provided redlines created in Microsoft Word so that the Board can easily review the changes made from one iteration of the policy to the next, beginning with the 2005 Policy.

1. History of the Policy

a. 1978 Policy

The earliest policy located regarding this issue is a November 1978 policy entitled “Town of Fairfield Severance Pay Policy – Exempt Employees in Management and Administrative Groups” (“1978 Policy”). The 1978 Policy does not have a signature block and is unsigned. It is unknown what, if any, bodies approved the 1978 Policy or how it was issued.

Section I of the 1978 Policy states that “[i]t is the policy of the Town to grant severance compensation to regular full-time **non-elected** exempt management and administrative group employees: [sic] in the event of permanent termination from the payroll and in accordance with eligibility conditions outlined below, provided such employees have maintained satisfied service records.” (Emphasis added.) The amount of severance pay under the 1978 Policy was one week’s pay for each full year of service, up to a maximum of 13 weeks’ pay. Severance pay “may be given only when it is reasonable to anticipate that the termination constitutes a permanent separation.” 1978 Policy, Section IV (1). Regarding vacation pay, the 1978 Policy states that “Employees qualifying for severance payment are to be paid for any vacation due and not already taken in addition to severance pay.”

The 1978 Policy appears to have been in effect until at least 1999 because it was attached to a November 23, 1999 memo from Paul H. Hiller, Jr., Fiscal Officer, to the Board of

Selectmen, Board of Finance, and RTM (the “1999 Hiller Memo”). As set forth in the 1999 Hiller Memo, the former First Selectman Flatto received a payout for accrued vacation time but did not receive a severance payout for losing the election.

b. 2005 Policy

The next version of the policy appears to be from 2005 and is entitled “Benefit Summary for Core Department Heads” (the “2005 Policy”) It is unsigned and does not contain a signature block. The 2005 Policy does not, by its terms, apply to the First Selectman. We are not aware of the 2005 Policy being approved by the Board of Selectmen or any other body. The introductory paragraph of the 2005 Policy states that the benefits in the policy are “as approved by the First Selectman.”

Regarding separation benefits, the 2005 Policy states:

In the event of a permanent termination from the payroll, you will be eligible to receive one week's pay for each full year of service, up to a maximum of thirteen (13) weeks pay. Partial years will be pro-rated accordingly. Calculation of severance will be at your regular base salary, excluding any additional compensation. Eligibility for severance compensation occurs in the case of dismissal for reasons other than cause, or for resignation by request when the circumstances are such that severance would have been due had you been dismissed instead.

Regarding unused vacation pay, the policy states that “[u]pon separation from Town employment, you will be paid for all unused vacation days to a maximum of fifty (50) days.”

c. 2010 Policy

The next version of the policy is from 2010 and is entitled “Town of Fairfield Benefit Summary for Non-Union Department Heads and Public Officials” (the “2010 Policy”) The 2010 Policy was signed by then-First Selectman Flatto on February 15, 2010. The 2010 Policy does not, by its terms, apply to the First Selectman. We are not aware of the 2010 Policy being approved by the Board of Selectmen or any other body. The introductory paragraph of the 2010 Policy states that the benefits contained in the policy are “annually reviewed” and “are established by the First Selectman and Director of Human Resources.”

Regarding separation pay, the 2010 Policy is substantively the same as the 2005 Policy, except the word “involuntary” was added to the first sentence. The 2010 Policy also increased the number of unused vacation days paid out from 50 to 60.

d. 2011 Policy

The next version of the policy is from 2011 and is entitled “Town of Fairfield Benefit Summary for Non-Union Department Heads and Public Officials” (the “2011 Policy”). It was

signed by then-First Selectman Flatto and is dated March 2011. We are not aware of the 2011 Policy being approved by the Board of Selectmen or any other body. The introductory paragraph of the 2011 Policy contains the same language as the 2010 Policy indicating that the benefits are “annually reviewed” and “are established by the First Selectman and Director of Human Resources.”

Regarding separation pay and unused vacation pay, the 2011 Policy is substantively the same as the 2010 Policy.

e. 2016 Policy

The next version is from 2016 and is entitled “Town of Fairfield Benefit Summary for Non-Union Department Heads and Public Officials.” The policy is unsigned, and no signed version has been located. The signature block was set up for the signature of then-First Selectman Tetreau. Although a signed copy of the 2016 Policy has not been located, it was provided to Department Heads at some point during the 2016-2019 period. The 2016 Policy was not approved by the Board of Selectmen or any other board.

The 2016 Policy is substantively the same as the 2011 Policy as to separation pay and unused vacation payouts.

f. 2019 Policy

The next version of the policy is entitled “Town of Fairfield Benefit Summary for Non-Union Department Heads and **Public Elected Officials**” dated November 25, 2019 (emphasis added) (the “2019 Policy”). The 2019 Policy was signed by then-First Selectwoman Brenda Kupchick. Emmet P. Hibson, Jr. was the Director of Human Resources at the time Ms. Kupchick signed the 2019 Policy.

The only substantive change between the 2016 and 2019 policies was to include public elected officials employed on a “regular full-time basis” within the scope of the policy. The only full-time elected officials employed by the Town are the First Selectman and the Town Clerk.

The 2019 Policy was not approved by the Board of Selectmen or any other board.

g. 2021 Policy

The next revision to the policy is dated July 8, 2021 and was signed by then-First Selectwoman Brenda Kupchick (the “2021 Policy”). The 2021 Policy contains the same language regarding public elected officials employed on a full-time basis by the Town. A redline of the changes made from 2019 to 2021 is included in the backup. James Haselkamp was the Director of Human Resources at the time Ms. Kupchick signed the 2021 Policy.

The 2021 Policy was not approved by the Board of Selectmen or any other board.

2. Prior Payments to Former First Selectmen

In 1999, Kenneth Flatto received a payout of \$10,099.30 for unused vacation days. This represented 29 1/3 days at the rate of \$344.23 per day. This information is contained in the 1999 Hiller Memo. According to the 1999 Hiller Memo, Mr. Flatto did not receive separation pay after his election loss in 1999.

Mr. Flatto subsequently won the election in 2001 and served as First Selectman from 2001 until his resignation in 2011. In 2011, Kenneth Flatto received a payout of \$29,446.15 for unused vacation days. This represented 60 vacation days at the hourly rate of \$70.11 reflecting 7 hours per day. Mr. Flatto did not receive separation pay after his 2011 resignation. Because Mr. Flatto resigned from the office, he would not have been entitled to receive separation pay under any version of the policy.

Michael Tetreau received a payout of \$30,356.5 for unused vacation days in 2019. This represented 57.2 vacation days at the hourly rate of \$75.87 reflecting 7 hours per day. Mr. Tetreau did not receive separation pay after his 2019 election loss.

3. Prior Separation/Vacation Payments to Chiefs of Staff to the First Selectman

According to the Town's Human Resources records, the Chief of Staff position is considered a "Department Head" for the purposes of eligibility for the Town's benefits.

As set forth in the 1999 Hiller Memo, the First Selectman's Executive Assistant and Secretary received severance payments of \$1,272.63 and \$1,230.76, respectively. They also received vacation payouts of \$6,193.48 and \$2,871.46, respectively. The 1999 Hiller Memo references that the payments were "in accordance with past practices, currently existing vacation schedules and severance pay agreements approved by the Board of Finance and RTM." The 1999 Hiller Memo does not indicate a Chief of Staff receiving severance or vacation payouts.

Tom Bremer, Thomas Dubrosky, and Nancy Carberry were prior Chiefs of Staff to the First Selectman's office. None of them received payouts for vacation or separation pay when they ceased working as Chiefs of Staff.

Jackie Bertolone received a severance payment of \$8,863 and unused vacation pay of \$5,684. Her offer letter dated December 4, 2019 does not refer to separation pay. The offer letter does identify vacation time as one of her benefits.

Offer letters were not located for Tom Bremer, Thomas Dubrosky, or Nancy Carberry.

4. Past Practice for Approval of Compensation and Benefits for the Chief of Staff to the First Selectman.

Other than the normal process to approve the Town's annual budget, it appears that the Board of Selectmen only independently evaluated the Chief of Staff's compensation at its June 24, 2015 meeting. At that time, the Board of Selectmen approved then-First Selectman Tetreau's

recommendation for Department Head Compensation. This recommendation included the salary for the Chief of Staff. Benefits were not addressed at this meeting according to the minutes.

5. Past Practice of Approving Compensation and Benefits for the First Selectman and Selectmen.

In the recent past, the Board of Selectmen has constituted a “Selectmen Compensation Committee” composed of two RTM members (one Republican, one Democrat) and two Board of Finance members (one Republican, one Democrat) to make recommendations to the Board of Selectmen for the compensation of the First Selectman and Selectmen.

At its June 24, 2015 meeting, the Board of Selectmen approved the committee’s compensation recommendation and an “advisory email” from then-Board of Finance Chair Tom Flynn. The compensation recommendation consisted of a 2.5% salary increase per year. The advisory email (which was also unanimously approved by the Selectmen Compensation Committee) is set forth in the minutes of the Board of Selectmen meeting as follows:

‘The committee would further like to recommend that the next Charter Revision Committee review in detail the total compensation structure for the Board of Selectmen.

Specifically, the committee would like addressed which town body should approve the salary as well as all other elements of compensation for BoS members including benefits, stipends and any other forms of remuneration considered.

The Committee recognizes that the First Selectman position is unique, as well as elected, in town government and our view is that all manner of compensation as defined above should be considered separate from all other town employees to insure his/her uncompromised ability to lead negotiations for the rest of the employee population.’

The Board of Selectmen formed another Selectmen Compensation Committee on July 19, 2019. The committee’s charge provided that it was to “make a comprehensive recommendation to the Board of Selectmen to determine compensation for the First Selectperson and the Selectmen for the period November 2019 through November 2023.” The committee made the following recommendations for the First Selectman’s compensation for this period:

July 1, 2020 -salary 0% increase and 21% insurance contribution

July 1, 2021- salary 0% increase and 22% insurance contribution

July 1, 2022- salary 1% increase and 23 % insurance contribution

July 1, 2023- salary 1.5% increase and 24% insurance contribution

The Board of Selectmen unanimously approved this recommendation at its October 2, 2019 meeting.

At its April 17, 2023 meeting, the Board of Selectmen again formed a Selectmen Compensation Committee composed of four members – two RTM members (one Republican, one Democrat) and two Board of Finance members (one Republican, one Democrat). The committee’s charge again provided that it was to “make a comprehensive recommendation to the Board of Selectmen to determine compensation for the First Selectperson and the Selectmen for the period November 2023 through November 2027.” The Selectmen Compensation Committee made recommendations regarding the First Selectperson’s salary, insurance cost sharing, and travel stipend. The Selectmen Compensation Committee’s recommendations were approved by the Board of Selectmen at its September 11, 2023 meeting.

6. Legal Questions

a) What is the required process to approve compensation for the First Selectman?

Section 5.2 of the Town Charter provides:

§ 5.2. Compensation of executive branch members.

The members of all boards and commissions except the Board of Selectmen shall serve without compensation unless the RTM shall otherwise direct. Except as provided in this Charter or otherwise by law, the compensation of all Town officers shall be fixed by the Board of Selectmen subject to the adoption of the Town budget as provided in Article XII of this Charter.

The term “Town officer” is defined in Section 1.3(B) of the Town Charter as follows: “‘Town officer’ means an individual elected or appointed to a Town office other than as a member of an authority, board, or commission.

The term “Town office” is also defined in Section 1.3(B) of the Town Charter as follows: “‘Town office’ means any position in Town government which is described by this Charter except membership on the Representative Town Meeting.”

The First Selectman position is a “Town office” within the meaning of the Town Charter. Therefore, the person serving in the role of the First Selectman is a “Town officer.” Accordingly, any compensation paid to the First Selectman requires approval of the Board of Selectmen under Section 5.2 of the Town Charter.

Consistent with Section 5.2 of the Town Charter, the Board of Selectmen has determined the compensation of the First Selectman and Selectmen on three separate occasions in the recent past, as set forth above. The Board of Selectmen has based its decisions on compensation for its members, including the First Selectman, on the recommendation of the bipartisan “Selectmen Compensation Committee.”

This approval process was not followed in connection with the adoption of either the 2019 Policy or the 2021 Policy which specifically made the First Selectwoman eligible for the additional compensation she received under those policies.

b) What is the required approval process to approve compensation for the Chief of Staff to the First Selectman and the Chief Administrative Officer?

Historically, the Chief of Staff has been an “at will” employee hired by the First Selectman to work within the First Selectman’s office. The Chief of Staff is not a “Town officer” within the meaning of the Town Charter, and therefore, Section 5.2 of the Town Charter is inapplicable to this position. Section 6.1(C)(1) of the Town Charter requires that “[a]ll contracts to which the Town shall be a party shall be subject to approval of the Board of Selectmen.” The hiring of employees on an “at will” basis is not a contract within the meaning of Section 6.1(C)(1) of the Town Charter such that it would require approval of the Board of Selectmen.¹

Section 6.2 of the Town Charter states, in part, that the First Selectman “shall . . . be the town agent and the chief executive officer of the town [and] direct the administration of all departments and officers.” Based on the language of the Town Charter, the First Selectman is authorized to implement policies governing the compensation of Town employees (other than the compensation of Town officers, such as the First Selectman). However, any such policies may not compensate Town employees in excess of the amount appropriated by the Board of Finance for a particular purpose. *See* Town Charter § 12.7. If the application of the policy would require the amount paid to exceed the amount appropriated, then the payment would need approval and a budgetary transfer from the Board of Finance.

The same analysis applies to the Chief Administrative Officer position, which is not a “Town officer” within the meaning of the Town Charter.

It is also observed that under Conn. Gen. Stat. § 7-460, the Representative Town Meeting (“RTM”), as the Town’s legislative body, may fix the compensation of the Town’s officials and employees, subject to the approval of the Board of Finance. Although the Town Charter vests the authority to set compensation with the Board of Selectmen, this language is preceded by “[e]xcept as provided in this Charter or otherwise by law” Accordingly, the Town Charter provision is not in conflict with the RTM’s discretionary authority under Conn. Gen. Stat. § 7-460. Any such action by the RTM must be taken in a manner that is consistent with Article 11, § 2 of the Constitution of the State of Connecticut (see Section 6(c) below), and any action by the RTM would not supersede, but would be in addition to, the Town’s annual budget review process.

¹ It is understood that none of the employees had a written employment contract for a specified term. It is likely that a written employment agreement for a specified term would require approval of the Board of Selectmen, particularly if the employee was employed on basis other than “at will.”

c) Was the payment of severance to First Selectwoman Kupchick for losing an election unconstitutional under either the Constitution of the United States, the Constitution of the State of Connecticut, or both?

The payment of severance to First Selectwoman Kupchick for losing an election pursuant to a policy she unilaterally enacted during her term of office most likely violates the Constitution of the State of Connecticut. Article 11, § 2 provides:

Except as provided in this section, neither the state nor any political subdivision of the state shall pay or grant to any elected official of the state or any political subdivision of the state, any compensation greater than the amount of compensation set at the beginning of such official's term of office for the office which such official holds The provisions of this section shall not apply to elected officials in towns in which the legislative body is the town meeting. The compensation of an elected official of a political subdivision of the state whose term of office is four years or more may be increased once after such official has completed two years of his term by the legislative body of such political subdivision. The term "compensation" means, with respect to an elected official, such elected official's salary, exclusive of reimbursement for necessary expenses or any other benefit to which his office would entitle him.

First Selectwoman Kupchick granted herself a right to compensation that was not in place at the beginning of her term of office when she signed the 2019 and 2021 policies. However, two remaining questions must be addressed to determine whether First Selectwoman Kupchick's actions violate this constitutional provision: (1) Does the exception for "elected officials in towns in which the legislative body is a town meeting" apply?; and (2) Are the separation benefits a "benefit to which [the First Selectwoman's] office would entitle [her]" such that they are excluded from the definition of "compensation" governed by this provision?

Starting with the first question, the Town's legislative body is the RTM and not a "town meeting." Moreover, the legislative history of the amendment enacting this provision suggests that the town meeting exemption was intended to apply only where the increase in compensation was approved by the public through a town meeting. As Senator Curry, the amendment's sponsor, explained "[t]he proposed amendment would not apply to elected officials in towns in which the legislative body is a town meeting (i.e., if the citizens of the towns themselves wish to vote a pay increase at an open town meeting for any official of the government, they be allowed to do so." (24 S. Proc. Pt. 15, 1981 Sess., p. 124). Here, the RTM did not approve the policy change, so even if "town meeting" were broadly interpreted to include a "representative town meeting" the exemption would not apply under the circumstances.

Turning to the second question, while there is no case law interpreting the definition of compensation as used in this context, the legislative history makes clear that the legislature intended to exclude "benefits to which [the elected official's] office may entitle him" from the

definition of compensation. *See*, 24 H.R. Proc. Pt. 20, 1981 Sess. p. 338, 348 (rejecting amendment that would have expressly included “any financial remuneration . . . including, but not limited to, salary, reimbursement for necessary expenses, and any other benefit to which his office would entitle him” in favor of language defining compensation as “salary, exclusive of reimbursement for necessary expenses or any other benefit to which his office would entitle him”). Therefore, the question is whether the separation pay at issue is a “benefit to which [the First Selectwoman’s] office would entitle her.” There is no case law interpreting this phrase and the intended meaning is not explained by the legislative history. However, given the purpose of the provision—to prohibit “mid-term pay raises” to elected officials—it is difficult to imagine that it would be constitutional for an elected official to grant him or herself additional compensation that takes the form of several weeks’ salary to be paid after his or her term in office has concluded.

Thus, while the outcome of a constitutional challenge to the payment of separation benefits to First Selectwoman Kupchick is not certain, it most likely would be deemed unconstitutional in violation of Article 11, § 2.

d) Assuming she would otherwise be entitled to vacation pay or separation pay, would former First Selectwoman Kupchick be entitled to receive these sums given that she is still a member of the Board of Selectmen and continues to receive payments from the Town?

Regarding vacation pay, assuming she was otherwise eligible (and thus assuming the 2021 Policy is valid), the former First Selectwoman would be entitled to vacation pay because the 2021 Policy entitles eligible employees to this payment “[u]pon separation from Town employment.” Although she continues to serve as a Selectman, former First Selectwoman Kupchick is no longer an employee of the Town. In terms of past practice, former First Selectman Flatto received payment for unused vacation when he lost the 1999 election and retained a seat on the Board of Selectmen. *See* 1999 Hiller Memo.

Regarding separation pay, assuming she was otherwise eligible (and thus assuming the 2021 Policy is valid), it is not clear from the 2021 Policy whether she would be entitled to separation pay because this section of the policy uses the qualifying language “[i]n the event of a permanent involuntary termination from the payroll” It does not refer to a “separation from Town employment,” which is the language used in the section of the policy dealing with unused vacation days. It is not clear whether the continued receipt of a stipend for service on the Board of Selectmen would constitute “payroll.” However, because the term “payroll” is most commonly used to refer to employees, the most logical interpretation of this language is that it would have the same meaning as a “separation from Town employment.” Therefore, assuming she was otherwise eligible (and thus assuming the 2021 Policy is valid), former First Selectwoman Kupchick’s position on the Board of Selectmen most likely would not disqualify her from receiving separation pay.

7. Recommendations for Future Action

- 1) Any compensation policy applicable to the First Selectman or Chief of Staff should be provided on a regular basis to the Board of Selectmen, Board of Finance, and RTM for their review and comment.
- 2) The First Selectman should not unilaterally set his or her compensation, including any benefits, and pursuant to the Town Charter, the Board of Selectmen should fix the First Selectman's compensation. Consistent with Article 11, § 2 of the Connecticut Constitution, any increases in compensation should occur prior to the commencement of the term when such increases would take effect. The historical process of the Board of Selectmen appointing a bipartisan, advisory "Selectmen Compensation Committee" can be effective to separate decision-making about compensation from the Board of Selectmen and ensure that compensation is independently evaluated. However, it is noted that this committee is appointed by the Board of Selectmen and that its recommendation is ultimately subject to a vote of only the Board of Selectmen. The process should be considered during the next revision of the Town Charter.
- 3) The RTM may consider taking action pursuant to Conn. Gen. Stat. § 7-460, subject to the approval of the Board of Finance, to set the compensation of the First Selectman, the Selectmen, and the Chief of Staff. Again, any such action by the RTM would not supersede, and would be in addition to, the Town's annual budget review process.