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November 17, 2004

Hon. Michael R. Bloomberg
Mayor
City Hall
New York, NY 10007

Dear Mr. Mayor:

In a memorandum dated October 15, 2004, you asked whether State laws governing the City's pension systems allow for treating couples who have entered into same-sex marriages in other jurisdictions where such marriages are legal in the same manner as couples who have entered into opposite-sex marriages, and if so, what actions need to be taken so that the pension systems are administered accordingly.

We have concluded that if a member has entered into a same-sex marriage in another state or country that is valid under the laws of that state or country, any benefits or rights that would be available to a member's "spouse," "widow" or "widower" under the retirement plan should also be available to the member's partner. This conclusion also applies to parties of civil unions entered into in another state or country where the rights and benefits of civil union are equivalent to those of marriage.

Enclosed is a draft resolution that your representatives on the pension boards may introduce to direct that the pension systems be administered in accordance with the advice provided in this opinion. I will be happy to arrange for members of my staff to meet with the boards and other representatives of the systems to discuss this issue further.

New York City Retirement Plans

Most New York City employees and former employees are members of one of five pension plans. Most of the benefits available under these plans do not depend on whether or not the member is married: either the member receives retirement benefits directly, or, if the

member dies before retirement, a death benefit is payable to whomever the member has designated as a beneficiary. Yet some benefits in the New York City retirement plans, including accidental death benefits, are payable only to a surviving "spouse" or to a spouse, child or parent, but not to any other person. See, e.g., Ad. Code 13-149 (NYCERS); id. at § 13-244 (accidental death benefit under police pension fund payable to spouse, then child, then parent.) Additionally, some rights under the New York City retirement plans may only be exercised by a "spouse" or "widow/widower," including the right to take an elective share of the estate of a deceased member. See e.g., New York Estates, Powers and Trusts Law § 5-1.1-A (all retirement plans).

Same-Sex Marriages and Civil Unions

This office and the Attorney General of New York have advised that New York's Domestic Relations Law does not provide for marriage between persons of the same sex. See, Letter of Corp. Counsel to City Clerk Victor Robles, dated March 3, 2004; Op. Atty Gen'l 2004-1 (Inf.). Recently, the Supreme Court for Rockland County cited the Attorney General's opinion in upholding the denial of marriage licenses to same-sex couples against statutory and constitutional challenges. Matter of Shields v. Madigan, 2004 N.Y. Misc. LEXIS 1823. This office and the Attorney General are continuing to litigate the constitutionality of the Domestic Relations Law in other courts. However, the issues in that litigation are separate from the question of the rights under the City's pension systems of parties to same-sex marriages and civil unions recognized in other jurisdictions.

Same-sex marriage is valid in Massachusetts, Goodridge v. Dep't of Public Health, 440 Mass. 309 (2003), and in some foreign countries, including Belgium, the Netherlands and some provinces of Canada. Additionally, Vermont's "civil union" statute offers the legal equivalent of marriage to same-sex and opposite-sex partners. 2000 Vermont Act 91; Vt. Stat. Ann. tit. 15 § 1201 et seq.[1] The question raised is how New York City's retirement plans should consider such relationships that may be entered into by members and retirees when determining entitlement to "spousal" benefits and rights.

New York's Common Law Recognizes Marriages from Other Jurisdictions

New York State common law has long recognized the validity of marriages entered into in other jurisdictions, even where those relationships would not have been legal under New York law. For example, although New York's Domestic Relations Law § 11 specifically precludes common law marriages, New York recognizes such relationships that are created validly in other states or countries. See, e.g., Shea v. Shea, 294 N.Y. 909 (1945); Katebi v. Hooshiari, 288 A.D.2d 188 (2d Dept. 2001) (recognizing common law marriage valid under Pennsylvania and

[1] See Vt. Stat. Ann. tit. 15 § 1204 (a) ("Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.")

Georgia law); In the Matter of the Judicial Settlement of the Accounts of Charles A. White, 129 Misc. 835 (Sur. Ct. Erie Co. 1927) (recognizing Ontario common law marriage).

The practical effects of New York's recognition of such relationships have included findings that a surviving partner to a common law marriage, validly entered into in another state, was entitled: to spousal benefits under New York's workers' compensation program, Mott v. Duncan Petroleum Trans., 51 N.Y.2d 289, 292-93 (1980); to bring a wrongful death action as a surviving spouse, Hulis v. M. Foschi & Sons, 124 A.D.2d 643, 644 (2d Dept. 1986); and to a spouse's elective portion under a will. In the Matter of the Estate of Antonio Pecorino, 64 A.D.2d 711 (2d Dept. 1978). In Matter of the Estate of Jones (File #5167/93, Surr. Ct. Queens, Dec. 5, 1995), the Surrogate Court recognized a Pennsylvania common law marriage and ordered that petitioner be granted a line of duty widow's pension from the New York Fire Department Pension Fund.

Although New York's rule of marriage recognition finds most frequent expression with respect to common law marriages, it has also been applied to other types of marriage specifically precluded by New York law. For example, in a case involving inheritance rights, the Court of Appeals in Van Voorhis v. Brintall, 86 N.Y. 18 (1881), recognized the validity of a man's second marriage entered in another state even though the order of the New York court which granted the annulment of his first marriage provided that he could not remarry while his ex-wife was still alive. And in In re Estate of May, 305 N.Y. 486 (1953), the Court of Appeals recognized a marriage entered in Rhode Island between an uncle and a niece, even though the Domestic Relations Law provided that such a marriage entered in New York would have been "incestuous and void". New York courts have also recognized valid marriages from other countries, even where the particular type of marriage would be illegal under New York law. See, e.g., In re Will of Valente, 18 Misc.2d 701 (Sur. Ct. Kings Co. 1959) (recognizing Italian "marriage by proxy").

Recognition of Same-Sex Marriages and Civil Unions

A New York court last year held that, under principles of full faith and credit and comity, where two New Yorkers had entered into a valid civil union under Vermont law, the surviving partner had the same standing as a "surviving spouse" to bring a wrongful death action under New York law. Langan v. St. Vincent's Hospital of New York, 196 Misc.2d 440 (Sup. Ct. Suffolk Co. 2003). The Langan decision is currently on appeal in the Second Department, where the New York Attorney General has filed an amicus curiae brief in support of plaintiff-respondent. Citing Langan, the Attorney General stated in his March 3, 2004 opinion that "New York law presumptively requires that parties to such unions must be treated as spouses for purposes of New York law." More recently, the New York State Comptroller, citing both Langan and the opinion of the Attorney General, determined that same-sex marriages entered into in Canada will be treated as valid for the purpose of determining entitlement to spousal

benefits under the New York State and Local Retirement System. See October 8, 2004 Letter of Alan G. Hevesi to Mark E. Daigneault.[2]

I am satisfied that Langan, the advice of the Attorney General and the State Comptroller's opinion comport with New York law and policy, and that spousal rights and benefits under New York City's retirement plans should be afforded to the partners of members who entered into a same-sex marriage, or other legal relationship equivalent to marriage, that is valid under the laws of the jurisdiction in which the legal relationship was created.

Recognition of such relationships is consistent with New York policy, which has acknowledged both the changing nature of familial relationships in modern society and the need to offer protection against discrimination based on sexual orientation. New York courts have protected same-sex couples for purposes of succession to tenancy as a "family member" in a rent-stabilized or rent-controlled apartment, Braschi v. Stahl Associates Co., 74 N.Y.2d 201, 211 (1989); East 10th Street Assocs. v. Estate of Goldstein, 154 A.D.2d 142 (1st Dep't 1990), motion for lv to app. denied, 84 N.Y.2d 813 (1995), and a same-sex partner's adoption of his or her partner's children. In the Matter of Jacob, 86 N.Y. 2d 651, 667-68 (1995). The Hate Crimes Act of 2000 provided heightened penalties for acts motivated by animus based on sexual orientation, among other grounds. Penal Law §§240.30(3); 240.31; 485.00; 485.05. By Chapter 2 of the Laws of 2002, the State Legislature amended the Civil Rights Law and the Human Rights Law to prohibit discrimination based on sexual orientation in employment, public accommodations, and housing.[3] Several enactments by the State Legislature provide for domestic partners of persons killed or injured in the attacks on the World Trade Center to be treated in the same manner as spouses: Chapter 467 of the Laws of 2002 (added section 4 to the Workers Compensation Law to provide death benefits for surviving domestic partners); Chapters 468 of the Laws of 2002 and 162 of the Laws of 2003 (provided for domestic partners of firefighters to receive death benefits pursuant to General Municipal Law §208-f and Ad. Code 13-347). The "Patriot Plan Act", Chapter 106 of the Laws of 2003, recognized domestic partners in a number of ways. It amended the Real Property Tax Law to provide an extension for both spouses and domestic partners of persons serving in the military. It also added a new section

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[2] The State Comptroller's opinion letter was written in response to a retirement system member who was considering getting married in Canada, and does not address the question, considered below, of whether a Vermont civil union should be treated in the same manner as a marriage.

[3] When the Legislature included "sexual orientation" within the prohibited categories of discrimination under the Human Rights Law, it stated that: "Nothing in this legislation should be construed to create, add, alter or abolish any right to marry that may exist under the constitution of the United States, or this state and/or the laws of this state." Laws 2002, ch 2, § 1. I understand this to mean that the Legislature did not intend to change the meaning of New York's Domestic Relations Law with respect to who may lawfully marry in New York. Recognizing same-sex marriages or civil unions from other jurisdictions pursuant to New York's common law rule of marriage recognition does not conflict with this understanding, as it does not affect existing law regarding who may enter into marriage in New York State.

354-b to the Executive Law, providing supplemental burial benefits to the domestic partner or spouse of certain persons who die while on active duty. Finally, it amended several statutes to promote communication between members of the service and their spouses or domestic partners, as well as other family members. Education Law §272 (requiring libraries to offer Internet access); Public Service Law §92 (requiring State to negotiate with telephone companies to provide special rates); Military Law §254 (requiring State to make teleconferencing facilities available). This year, the Legislature added section 2805-q to the Public Health Law to ensure that domestic partners have the same visitation rights in hospitals and nursing facilities as spouses.

The City of New York also has strong laws and policies protecting the interests of same-sex couples. Local Law Number 2 of 1986 (the "Gay Rights Law") amended the City's Human Rights Law, Ad. Code 8-101 *et seq.,* to prohibit discrimination based on sexual orientation. Orders conferring benefits on domestic partners were adopted by Mayor Koch and Mayor Dinkins; these orders were ratified by Mayor Giuliani and then by you. City employees have been able to obtain health benefit coverage for their domestic partners since 1994. Local Law No. 27 of 1998 codified a domestic partner registration program and amended the Charter and Administrative Code to provide equal treatment for domestic partners registered pursuant to the City's program and spouses in a number of areas. The rights and benefits so extended to domestic partners registered in the City were made applicable to domestic partners registered in other jurisdictions, as well as to parties to same-sex marriages and civil unions from other jurisdictions, by Local Law 24 of 2002.

The federal "Defense of Marriage Act" ("DOMA"), defines "marriage" for purposes of federal law and rules as "only a legal union between one man and one woman as husband and wife ," 1 U.S.C. § 7, and provides that no State "shall be required to give effect to any public act, record, or judicial proceeding of any other State, ... respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State...." 28 U.S.C. §1783C. Langan observes that New York, unlike the federal government and a majority of the other states, has not enacted legislation explicitly withholding recognition of same-sex marriages from other jurisdictions. 196 Misc. 2d at 445. I agree with the Langan court that this is further evidence that "New York's public policy does not preclude recognition of a same-sex union entered into in a sister state." 196 Misc. 2d at 447.

Two aspects of the Langan decision merit further discussion here. First, the court's ruling in Langan was explicitly limited to the question of whether a same-sex marriage or civil union should be recognized for the purposes of determining spousal standing under New York's wrongful death statute, and did not address other purposes such as the administration of pension benefits. 196 Misc. 2d at 444. However, the court rulings and legislative acts cited by Langan, and additional legislation described above, all support the conclusion that same-sex marriages should be recognized by our pension systems. That recognition is consistent with public policy in this context is supported in particular by the fact that legislation was enacted in the wake of the attacks on the World Trade Center to afford pension and workers' compensation benefits to domestic partners, including same-sex and opposite-sex partners, on the same basis as spouses. There is nothing in the statutes governing the City's pension systems that would lead to a different conclusion.

Second, Langan treated a civil union performed under Vermont law as the equivalent of a marriage. The equivalency of these relationships is a novel issue which is now before the Second Department on appeal. For the reasons explained below, I agree with the holding of Langan and advise that the pension systems treat parties to a Vermont civil union in the same manner as parties to a marriage.

In Baker v. State, 744 A.2d 864 (1999), the Vermont Supreme Court held that the exclusion of same-sex couples from the rights and benefits of marriage violated the Common Benefits Clause of the Vermont Constitution. The Court ordered the Vermont Legislature to "craft an appropriate means of addressing this constitutional mandate" that would afford same-sex couples the opportunity to obtain the "same benefits and protections afforded by Vermont law to married opposite-sex couples." Id. at 886.

The Vermont Legislature responded by creating the institution of "civil union." 2000 Vermont Act 91; Vt. Stat. Ann. tit. 15 § 1201 et seq. In so doing, the Legislature stated in legislative findings that "[c]ivil marriage under Vermont's marriage statutes consists of a union between a man and a woman," and that "a system of civil unions does not bestow the status of civil marriage." The Legislature identified the purpose of the civil union law as follows: "The purpose of this act is to respond to the constitutional violation found by the Vermont Supreme Court in Baker v. State, and to provide eligible same-sex couples the opportunity to 'obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples' as required by Chapter I, Article 7th of the Vermont Constitution."

Like the findings described above, the substantive provisions of the Vermont civil union law also draw distinctions between marriage and civil union. Section 1201 (4) defines marriage as "the legally recognized union of one man and one woman." Section 1202 (2), which states the requisites for a civil union, provides that the parties must "be of the same sex and therefore excluded from the marriage laws" of Vermont. However, the body of the law provides for equivalency between the two relationships. Section 1204 (a) states that "Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage." (Emphasis added.) Section 1204 (e) sets forth a "nonexclusive list of legal benefits, protections and responsibilities of spouses, which shall apply in like manner to parties to a civil union." (Emphasis added.)

Two cases decided by courts of other states prior to Langan declined to treat a Vermont civil union in the same manner as a marriage. In Burns v. Burns, 560 S.E.2d 47 (Ga. App. 2002), cert. denied, 2002 Ga. LEXIS 626 (Sup. Ct. Ga. July 15, 2002), the court denied custody visitation rights to a mother on the grounds that she had violated a court order by living with another person to whom she was not legally married, even though she had entered into a civil union with that person. Rosengarten v. Downes, 71 Conn. App. 372 (App. Ct.), cert. granted and dismissed, 261 Conn. 936 (2002), held that the court had no jurisdiction over an action to dissolve a Vermont civil union. Both Burns and Rosengarten relied in part on language of the Vermont civil union statute which distinguishes civil unions from marriages.

In contrast, Salucco v. Alldredge, 17 Mass. L. Rep. 498 (Super. Ct. 2004), decided after Langan, held that a Massachusetts court had equity jurisdiction to dissolve a Vermont civil union. It noted that the application of the full faith and credit clause to Vermont civil unions is "not certain" because the parties are not considered to be married in Vermont, and that the Massachusetts divorce law was inapplicable because Vermont does not define civil union as a marriage. Nevertheless, the court determined that allowing the parties a legal remedy for dissolution was consistent with rulings of the Massachusetts high court in Goodridge v. Dep't of Public Health, 440 Mass. 309 (2003)(declaring that exclusion of same-sex couples from marriage violated the Massachusetts constitution).

The Langan court focused more on the substantive provisions of the Vermont civil union law – that is, those conferring benefits, protections, rights and responsibilities, -- than did these other courts. After summarizing these provisions, the court characterized the civil union as "distinguishable from marriage only in title," noting that the statute "goes so far as to include a presumption of legitimacy for either party's natural child born during the union," and that:

> The presumption of legitimacy, when extended to a same sex couple, together with the obligations of support and requirement for a divorce, indicate that the civil union is indistinguishable from marriage, notwithstanding that the Vermont legislature withheld the title of marriage from application to the union."

196 Misc. 2d 448-449. Similarly, the Attorney General's *amicus curiae* brief to the Second Department argues that:

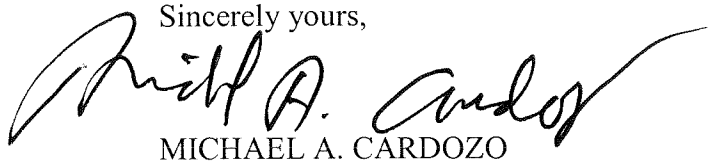
> There is only one difference between the Vermont law governing "marriage" and the Vermont law governing "civil unions," and this is purely a difference in form, not substance: Vermont reserves the label "marriage" only for "the legally recognized union of one man and one woman," and the label "civil union" only for the legally-recognized union of two persons of the same sex. As a result, the procedures for licensing and recording marriages and civil unions, though virtually the same in substance, are located in separate, albeit adjacent, chapters of Vermont's statutory compilation. This difference in name, however, cannot be grounds for including a party to a Vermont marriage, but not a party to a Vermont civil union, within the term "spouse" under EPTL §4-4.1(a). Again, Vermont law expressly affords parties to a Vermont civil union all the same legal rights and responsibilities afforded parties to a Vermont marriage.

The views expressed by the Langan court and the Attorney General are, in my opinion, correct. They are supported by the Vermont civil union statute when read in its entirety, and by its history as an enactment required to remedy the violation of Vermont's constitution which arose in the absence of equal rights for same-sex couples to enter a relationship equivalent to marriage.

Conclusion

In light of the foregoing, New York City's retirement plans should offer the same benefits and rights to the partners of plan members in (i) same-sex marriages that are valid in the jurisdiction where they were entered; and (ii) civil unions, whether made valid in Vermont, or in a form substantially similar in legal effect to those created by Vermont law, as they do to spouses from valid opposite-sex marriages.

Sincerely yours,



MICHAEL A. CARDOZO

RECOGNIZING THE SPOUSAL STATUS OF THE PARTNERS OF TEACHERS RETIREMENT SYSTEM MEMBERS WHERE THE MEMBER AND PARTNER HAVE ENTERED INTO A VALID SAME-SEX MARRIAGE OR CIVIL UNION IN ANOTHER JURISDICTION

Whereas, The Board of Trustees is aware that a same-sex couple may now enter into a valid marriage in the Commonwealth of Massachusetts and in certain foreign countries, including Canada; and

Whereas, The Board of Trustees also is aware that in Vermont, a same-sex couple may now enter into a legal relationship known as a "civil union" which affords substantially all of the rights and responsibilities of a civil marriage; and

Whereas, The Comptroller of the State of New York, as sole trustee of the State retirement systems, has recently announced his decision to treat the partners of members as "spouses" where the member and the member's partner entered into a legal same-sex marriage in Canada; and

Whereas, The Board of Trustees is aware that members of the Teachers Retirement System may enter into valid same-sex marriages or civil unions in other jurisdictions; and

Whereas, The Corporation Counsel recently has advised that the law and public policy of New York State and New York City support the Teachers Retirement System's recognition of a member's same-sex partner as a spouse, where the member and the member's partner have entered into a valid same-sex marriage, or civil union in another jurisdiction where the rights and benefits of civil union are equivalent to those of marriage; now, therefore, be it

Resolved, That the Board of Trustees authorizes and directs the Executive Director, consistent with the attached opinion of the Corporation Counsel, to recognize the same-sex marriages and civil unions of Teachers Retirement System members lawfully entered into in other jurisdictions, for the purpose of determining all rights, responsibilities and benefits afforded to the "spouse," "surviving spouse," "widow" or "widower" of a member.

Respectfully Submitted:

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Executive Director

RECOGNIZING THE SPOUSAL STATUS OF THE PARTNERS OF NYCERS MEMBERS WHERE THE MEMBER AND PARTNER HAVE ENTERED INTO A VALID SAME-SEX MARRIAGE OR CIVIL UNION IN ANOTHER JURISDICTION

Whereas, The Board of Trustees is aware that a same-sex couple may now enter into a valid marriage in the Commonwealth of Massachusetts and in certain foreign countries, including Canada; and

Whereas, The Board of Trustees also is aware that in Vermont, a same-sex couple may now enter into a legal relationship known as a "civil union" which affords substantially all of the rights and responsibilities of a civil marriage; and

Whereas, The Comptroller of the State of New York, as sole trustee of the State retirement systems, has recently announced his decision to treat the partners of members as "spouses" where the member and the member's partner entered into a legal same-sex marriage in Canada; and

Whereas, The Board of Trustees is aware that members of NYCERS may enter into valid same-sex marriages or civil unions in other jurisdictions; and

Whereas, The Corporation Counsel recently has advised that the law and public policy of New York State and New York City support NYCERS' recognition of a member's same-sex partner as a spouse, where the member and the member's partner have entered into a valid same-sex marriage, or civil union in another jurisdiction where the rights and benefits of civil union are equivalent to those of marriage; now, therefore, be it

Resolved, That the Board of Trustees authorizes and directs the Executive Director, consistent with the attached opinion of the Corporation Counsel, to recognize the same-sex marriages and civil unions of NYCERS members lawfully entered into in other jurisdictions, for the purpose of determining all rights, responsibilities and benefits afforded to the "spouse," "surviving spouse," "widow" or "widower" of a member.

Respectfully Submitted:

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Executive Director