

# Government of the District of Columbia

OFFICE OF THE CORPORATION COUNSEL

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January 27, 1993

## OPINION OF THE CORPORATION COUNSEL

**SUBJECT:** May the D.C. Controller recoup retirement salary overpayments made to three retired judges of the Superior Court?

Mr. N. Anthony Calhoun  
D.C. Controller  
415 12th Street, N.W. Room 412  
Washington, D.C. 20004

Dear Mr. Calhoun:

This is in response to your December 23, 1992 request for my opinion concerning whether the District may recoup retirement salary overpayments erroneously made to three judges of the Superior Court who retired for disability. You also request my opinion concerning whether the District's Pay and Retirement Office is correctly applying the statutory language that governs the computation of the retirement salary of a judge of the Superior Court or the District of Columbia Court of Appeals who retires for a disability.

In summary, my conclusions are: (1) the retirement salaries of the three judges in question were initially calculated in a manner that was incorrect, resulting in overpayments; (2) the District should apply the correct calculation to future payments; and (3) the District can bring an action to recoup the overpayments, but should consider whether this is an appropriate case in which to do so. I will address the computation question first.

### Retirement Salary Computation for Judges Who Retire for Disability

All three judges in question, Robert H. Campbell, Alfred Burka, and James A. Washington, voluntarily retired for disability from the Superior Court of the District of Columbia. They were eligible to retire for disability and receive a retirement salary because all three had, at the time of their retirements, "five

years or more of judicial service, including civilian service [i.e., other service] performed by the judge that is creditable [for retirement purposes] under section 8332 of title 5, United States Code." D.C. Code § 11-1562(c) (1992). According to the information supplied by Mr. Jerry R. Peyton, the Director of the Office of Pay and Retirement, Judge Campbell had 6.5 years of judicial service and 21.67 years of other creditable service; Judge Burka had 12.38 years of judicial service and 6.33 years of other creditable service; and Judge Washington had 13.75 years of judicial service and 10.5 years of other creditable service. Each judge elected, pursuant to D.C. Code § 11-1564(c) (1992), to have this other creditable service counted in the computation of his retirement salary.

The D.C. Code provision that governs the computation of a judge's retirement salary is D.C. Code § 11-1564 (1992) which provides in relevant part:

(a) The retirement salary of a judge who retires pursuant to section 11-1562 (a) and (b) shall be paid annually in equal monthly installments during the remainder of his life and shall bear the same ratio to his basic salary immediately prior to the date of his retirement as the total of his aggregate years of service bears to the period of thirty years. \* \* \* In no event shall the retirement salary (including the amount provided by subsection (c) of this section) of a judge exceed 80 per centum of his basic salary immediately prior to the date of his retirement.

(b) The retirement salary of a judge retired for disability pursuant to section 11-1526(b) or section 11-1562(c) or (d) shall be paid annually in equal monthly installments during the remainder of his life and shall be computed as provided in subsection (a). \* \* \* In no event shall the retirement salary of a judge retired for disability be less than 50 per centum or exceed 80 per centum of his basic salary immediately prior to the date of his retirement.

(c) In computing the retirement salary of a judge retiring under section 11-1562, the judge shall be entitled, if he so elects during the continuance of his judicial service or at the time of his retirement, to receive, in addition to the amount provided for in subsection (a) of this section, an amount (payable annually in equal monthly installments during the remainder of his life) based on military and civilian service performed by the judge which is creditable under section 8332 of title 5, United States Code....

(Emphasis added.)

Peyton indicates that, in computing the initial retirement salaries of Judges Campbell, Burka, and Washington, the person who did the computation<sup>1</sup> first applied the 50% floor set forth in subsection (b) to the basic salary each judge earned immediately prior to his retirement and used that figure as the judicial service component of the retirement salary. In the second step, the person calculated the amount due each judge for that judge's other creditable service. In the third step, the person added these two components together to arrive at a preliminary retirement salary figure. Finally, the person calculated the ceiling and floor figures for each judge and made an adjustment if the preliminary retirement salary figure was above the ceiling or below the floor.<sup>2</sup>

In an audit of these computations by independent auditor Grant Thornton, Mr. Thornton expressed the opinion that this method of computation is incorrect. In Mr. Thornton's view the judicial service component of the retirement salary figure should be computed by applying the formula set forth in subsection (a) and then adding to this figure the amount, if any, due under subsection (c) for other creditable service. The 50% floor set forth in subsection (b) should be used only for the purpose of ensuring that the final retirement salary figure of a judge retiring for disability is not below the judge's floor figure. In a memorandum dated May 1, 1992, Jeanna M. Cullins, General Counsel to the D.C. Retirement Board, concluded that the computation method applied by Mr. Thornton is the correct method.

For the reasons set forth below, I conclude that the person who initially calculated the retirement salaries of these three judges incorrectly applied the relevant subsections of D.C. Code § 11-1564. I further conclude that Mr. Thornton's method of computation, which has the concurrence of the Retirement Board's General Counsel, is the proper computation method.<sup>3</sup>

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<sup>1</sup> An examination of the worksheets for each of these judges indicates that the same person did all three computations.

<sup>2</sup> In Judge Campbell's case, because of his many years of additional creditable service, the total of the two components exceeded the 80% ceiling and was then lowered to the ceiling.

<sup>3</sup> Here, it is relevant to note that on February 13, 1990, which was prior to Auditor Grant Thornton's discovery of the error in the retirement salary computations of Judges Campbell, Washington, and Burka, Superior Court Judge Carlisle E. Pratt retired for disability. Mr. Peyton of the Office of Pay and Retirement reports that an examination of Judge Pratt's retirement file indicates that Judge Pratt's retirement salary was calculated on the basis of a correct application of subsections (a), (b), and (c) of D.C. Code § 11-1564.

The relevant language of D.C. Code § 11-1564 was enacted by Congress as part of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Public Law 91-358, 84 Stat. 501. "The starting point in statutory construction is to read and examine the text of the act and draw inferences concerning the meaning from its composition and structure." 2A Sutherland, Statutory Construction § 47.01 (5th ed. 1992). The words used in a statutory provision are the primary and usually the most reliable source of interpreting the intent of the legislative body that enacted the provision. Winters v. Ridley, 596 A.2d 569, 572 (D.C. 1991).

The above-quoted subsections of D.C. Code § 11-1564 establish the following principles applicable to the initial computation of a judge's retirement salary: (1) The underscored language in subsection (b) above makes clear that when computing the retirement salary of a judge who retires for disability, the computation formula set forth in subsection (a) shall be used. (2) With regard to all judges, regardless of the type of retirement, there is a retirement salary ceiling equal to 80 percent of the judge's basic salary immediately prior to the date of his or her retirement; thus, no initial retirement salary may exceed this ceiling. (3) With regard to judges who retire for disability, there is, in addition to the 80 percent ceiling, a retirement salary floor<sup>4</sup> equal to 50 percent of the judge's basic salary immediately prior to the date of his retirement; thus, no initial retirement salary for a judge who retires for disability may be less than this floor. (4) Under subsection (c), a judge's other creditable service may be counted "[i]n computing the [judge's] retirement salary" if the judge so elects, either while on active duty or at the time of retirement; thus, if a judge elects to count this other creditable service, it becomes a component of the judge's "retirement salary."

Therefore, in the case of a judge who retires for disability and who has other creditable service which the judge has elected to count in the computation of his or her retirement salary, the first step is to apply the computation formula set forth in subsection (a). For example, Judge Campbell's basic salary immediately prior

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<sup>4</sup> The term "floor" was used by then Court of General Sessions Chief Judge Harold H. Greene in his prepared statement in support of a similarly worded provision in S. 1214, 91st Cong., 1st Sess., a court reform bill that was being considered at the same time as the bill (S. 2601) that became the Court Reform Act. See Hearings before the Committee on the District of Columbia and Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary United States Senate, 91st Cong., 1st Sess., on S. 1066, S. 1067, S. 1214, S. 1215, S. 1711, and S. 2601, Part 3, at p. 1212 (1969).

to the date of his retirement was \$49,050. His judicial service as a Superior Court judge lasted 6.5 years. Accordingly, applying the computation formula set forth in subsection (a), the judicial service component of Judge Campbell's retirement salary is the percent of \$49,050 that 6.5 years is of 30 years. In Judge Campbell's case the answer is \$10,627.50. As noted above, Judge Campbell had 21.67 years of other creditable service (including both military service and service in the Office of the Corporation Counsel). Under the applicable computation provisions set forth in 5 U.S.C. §§ 8334 and 8339, these 21.67 years of other creditable service entitled Judge Campbell to an additional \$19,415.66. When this figure is added to the judicial service figure, the total is \$30,043.16. Since Judge Campbell retired for disability, the next step is to calculate under subsection (b) both the floor and the ceiling figures for Judge Campbell. If the \$30,043.16 figure is below the floor, it would have to be raised to the floor. On the other hand, if the \$30,043.16 figure is above the ceiling, it would have to be lowered to the ceiling. As indicated above, Judge Campbell's basic salary immediately prior to his retirement was \$49,050. Therefore, Judge Campbell's floor was \$24,525 (50% of \$49,050), and his ceiling was \$39,240 (80% of \$49,050). Since the \$30,043.16 figure lay between his floor and ceiling figures, no adjustment was necessary. Therefore \$30,043.16 was the approximately correct initial retirement salary figure for Judge Campbell. And the approximately correct initial monthly retirement salary installment that should have been paid to Judge Campbell was \$2503.60 (\$30,043.16 divided by 12 months).<sup>5</sup> As noted in footnote 2, *supra*, the person who initially computed Judge Campbell's retirement salary concluded that he was entitled to an amount equal to the ceiling applicable to his salary, namely \$39,240 or \$3,270 per month (\$39,240 divided by 12 months). Thus, at the commencement of his retirement, Judge Campbell received a monthly retirement salary that was more than \$760 in excess of the amount to which he was entitled under D.C. Code § 11-1564.

In sum, the method of computation used by person who initially computed the retirement salaries of Judges Campbell, Burka, and Washington was incorrect because it violated the express command in subsection (b) that "[t]he retirement salary of a judge retired for disability... shall be computed as provided in subsection (a)." (Emphasis added.) This express direction to use the formula in subsection (a) to calculate the retirement salary of a judge retiring for disability makes clear that Congress intended the 50 percent floor in subsection (b) to be used not for the purpose of

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<sup>5</sup> I use the phrase "approximately correct" because Mr. Peyton of the Office of Pay and Retirement reports that his office uses a "rounding" method of computation under which Judge Campbell's correct initial monthly retirement salary figure has been calculated to be \$2506.85 rather than the \$2503.60. I accept Mr. Peyton's figure.

initially calculating the judicial service component of the retirement salary figure, but only for the purpose of ensuring that the retirement salary calculated under the formula set forth in subsection (a) (and subsection (c), if applicable) is at least equal to 50% of the judge's basic salary at the time of retirement in the case of a judge retired for disability.<sup>6</sup> Thus, I conclude that Judges Campbell, Burka, and Washington have been paid a retirement salary in excess of that to which they were legally entitled under D.C. Code § 11-1564. Accordingly, their retirement salaries should be reduced to the correct level.

#### District's Authority to Recoup Overpayments

By memorandum (copy enclosed), dated December 4, 1987, to Larry P. Polansky, this Office opined (at page 3) that there is "no statutory authority for the Controller to withhold payment of retirement benefits" to retired judges as a means of recouping past retirement overpayments. Since the status of the statutory law in this regard has not changed, it must be concluded that the set-off remedy is not available to the District as a means of recovering these overpayments.

If the three retired judges in question are unwilling voluntarily to refund these overpayments then civil actions for recoupment could be instituted against them. An action by the District to recover public funds erroneously paid to an individual is an action to vindicate public rights. Accordingly, in bringing a suit to recover retirement salary overpayments, the District is not now and has never been subject to the time limitations set forth in the District's statute of limitations, D.C. Code § 12-301 (1989). See District of Columbia v. Owens-Corning Fiberglas Corporation, 572 A.2d 394 (1990), cert. denied 111 S.Ct 213 (1990). See also: the last sentence of D.C. Code § 12-301 which provides "This section does not apply...to actions brought by the District of Columbia

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<sup>6</sup> An examination of the legislative history of the Court Reform Act has revealed nothing indicating that Congress intended the 50% floor to be applied in the manner it was applied by the person who initially calculated the retirement salaries of Judges Campbell, Burka, and Washington. That legislative history is consistent with the view expressed here, namely that Congress intended the 50% of basic salary figure solely to be a minimum below which, in disability retirement cases, a retirement salary as otherwise calculated, could not fall. See, e.g., H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 41 (1970) ("In the case of a judge retired voluntarily or involuntarily for disability, the minimum retirement salary shall be not less than 50 percent nor more than 80 percent of the basic salary on the day before the day of retirement").

government."<sup>7</sup> Thus, the District may seek recoupment of all overpayments from the first to the last. Moreover, since the District would be seeking the recovery of "public funds," it does not appear that these retired judges could successfully interpose any equitable defenses such as equitable estoppel. See Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51 (1984) (United States was not estopped from recovering overpayment of medicare reimbursement for salaries of CETA-funded employees who provided services to medicare patients); Johnston v. Iowa Department of Human Services, 932 F.2d 1247 (8th Cir. 1992) (State agency not estopped from recovering AFDC overpayments made through error); United States v. Fowler, 913 F.2d. 1382 (9th Cir. 1990) (United States not estopped from recovering money paid to persons ineligible for federal flood insurance). Compare Office of Personnel Management v. Richmond, 496 U.S. 414 (1990) (the defense of equitable estoppel cannot be used to estop the Government from denying the payment of disability annuity benefits not otherwise permitted by law).

Sincerely,



John Payton  
Corporation Counsel

Enclosure

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<sup>7</sup> The language concerning actions by the District government was added in the District of Columbia Statute of Limitations Amendment Act of 1986, effective February 27, 1987, D.C. Law 6-202. One of the purposes of the bill (Bill 6-510), which was prepared by the Executive and which became D.C. Law 6-202, was "to make clear that the limitations provisions of sections 12-301 and 12-310 of the D.C. Code do not apply to the District government when it sues to enforce public rights." Transmittal Letter, dated July 16, 1986, from the Mayor to Council Chairman David A. Clarke. At the time Bill 6-510 was being considered by the Council, the District's position was that, even absent language expressly exempting actions by the District government in these statutory provisions, the limitations in those provisions do not apply to the District government when it brings suit to vindicate public rights. That position was later upheld by the D.C. Court of Appeals in District of Columbia v. Owens-Corning Fiberglas Corporation, supra.