

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL



ATTORNEY GENERAL

February 8, 2011

OPINION OF THE ATTORNEY GENERAL

SUBJECT: Authority of the District of Columbia Chief Financial Officer Over the Financial Functions and Financial Personnel of the District of Columbia Housing Authority

Hon. Adrienne Todman
Executive Director
D.C. Housing Authority
1133 North Capitol Street, N.E.
Washington, D.C. 20001

Dear Ms. Todman:

This opinion, which is issued pursuant to Reorganization Order No. 50 of 1953, as amended, and, as such, operates as "the guiding statement of the law" to be followed by all District agencies and employees "in the performance of their official duties," in the absence of specific action by the Mayor or the Council, or until overruled by controlling court decision,¹ addresses the recently posed question that was discussed between you and the City Administrator:

Does the District of Columbia Chief Financial Officer (District CFO) have the authority to supervise and to control the financial functions and financial personnel of the District of Columbia Housing Authority (DCHA)?

I understand that the question has been the subject of some debate. DCHA has maintained that the District CFO does not have the requisite authority, based on DCHA's establishment as an independent agency of the District government and its receipt of funds by the federal Department of Housing and Urban Development (HUD). The District CFO has taken the opposite view, contending that the reach of his powers extends to both subordinate and independent District agencies, including those that receive most or a substantial portion of their funding from the federal government.

This opinion is designed to resolve the question definitively. Having reviewed the applicable congressional and Council legislation, the legislative history, and the uniform opinions of my

¹ See also *United States Parole Commission v. Noble*, 693 A.2d 1084, 1099 (D.C. 1997), adopted on rehearing *en banc*, 711 A.2d 85 (D.C. 1998).

predecessors, as explained below, I conclude that the District CFO has the authority to supervise and to control the financial functions and financial personnel of DCHA.

SUMMARY OF ANALYSIS

Continuously since 1995 Congress has passed legislation amending the Home Rule Act and providing that the District CFO has the responsibility for supervising the control of "all" public funds belonging to or "under the control" of any department or agency of the District government, including any of its independent agencies. In 1996, my predecessor, Charles F.C. Ruff, issued a formal opinion making clear that all independent agencies of the District government were bound to follow the requirements of the Home Rule Act. A later opinion made clear that the District Council has no authority from Congress to create any entity which is not part of the District government. In 2005, when the Council amended DCHA's enabling statute, it was aware of both the congressional provisions relating to the District CFO and the binding, unopposed opinion of Corporation Counsel Ruff. Therefore, it specifically provided in its amendment to the section of the statute creating the DCHA, as an independent agency of the District government, that the DCHA "shall expend, and account for the expenditure of funds, in the same manner as all other agencies of the District government." Corporation Counsel and Attorney General opinions subsequent to the creation of the DCHA have reiterated that all independent agencies of the District government are bound by the financial requirements of the Home Rule Act, unless expressly exempted by Congress. In view of the plain language of the congressional and Council legislation, the legislative history of those statutes, and the uniform interpretation of governing Corporation Counsel and Attorney General opinions, it is absolutely clear that the financial affairs of the DCHA, including the funds it holds in a fiduciary capacity from the federal government, must be under the supervision and control of the District CFO. Indeed, the regulations of HUD specifically recognize that local agencies receiving its funds must handle them in accordance with governing local law, which, of course, is all the more imperative when that local law has been passed and/or reviewed by the United States Congress.

DISCUSSION

My conclusion is best viewed in the context of legislation that was initially passed, respectively, by Congress and the Council in response to two events in the District's recent history. The first event was the fiscal crisis of the mid-1990s, which resulted in, among other things, Congress's creation of the Office of the Chief Financial Officer (OCFO) as an independent entity established by sections 424a through 424e of the District of Columbia Home Rule Act (Home Rule Act), approved December 24, 1973, Pub. L. 93-198, 87 Stat. 774, D.C. Official Code §§ 1-204.24a through 1-204.24e (2010 Supp.). The other was the failure of the District's public housing program, which led the Council to establish DCHA in 1999. I will discuss each development in turn.

I. The Role of the CFO in the District of Columbia Government

In 1995, the House Committee on Government Reform and Oversight found that the District was then "experiencing a chronic and profound budgetary crisis," H. R. Rep. No. 104-96, at 15 (1995), and that the "problems exceed[ed] the challenge of debt management alone." *Id.* The

legislative response came in the form of the District of Columbia Financial Responsibility and Management Assistance Act of 1995 (FRMAA), approved April 17, 1995, Pub. L. 104-8, 109 Stat. 97, which was described in the committee report, at 33, as “Congress’s commitment...to assure the fiscal health of the District of Columbia in both the short and the long term.”

One key provision of the FRMAA² was the establishment of OCFO, to be headed by the District CFO.³ Indeed, the importance of the District CFO’s role in the overall scheme was underscored by the House committee’s stated expectation that “the Mayor [would] recognize the **vital role that the CFO will play** in the implementation of this legislation.” H. R. Rep. No. 104-96, at 48. (Emphasis supplied.)

The FRMAA vested the District CFO with broad authority over the District’s finances and financial personnel. The District CFO’s specific duties are now set out in section 424d of the Home Rule Act (D.C. Official Code § 1-204.24d) and include most that were originally set out in the FRMAA. Of those duties, three are quite relevant here. See D.C. Official Code § 1-204.24d(6) (“Supervising and assuming responsibility for financial transactions to ensure adequate control of revenues and resources.”); D.C. Official Code § 1-204.24d(11) (“Maintaining custody of **all** public funds belonging to or **under the control of the District government** (or any department or agency of the District government)[.]”) (emphasis supplied); and D.C. Official Code § 1-204.24d(12) (“Maintaining custody of **all** investment and invested funds of the District government or **in possession of the District government in a fiduciary capacity**[.]”). (Emphasis supplied.)

In 1996, the District CFO’s personnel authority was clarified by section 142(a) of the District of Columbia Appropriations Act, 1997, approved September 9, 1996, Pub. L. 104-194, 110 Stat. 2356, which provided that during any control period:

The heads and all personnel of the following offices, together with all other District of Columbia accounting, budget, and financial management personnel (**including personnel of independent agencies** but not including personnel of the legislative and judicial branches of the District government), shall be appointed by, shall serve at the pleasure of, and shall act under the direction and control of the Chief Financial Officer. (Emphasis supplied.)

This provision⁴ was explained in the legislative history as a necessary clarification to “insure that the financial personnel of each independent agency in the District, **without exception**, are appointed by, serve at the pleasure of, and act under the direction and control of the Chief Financial Officer.” H. R. Rep. 104-740, at 17-18 (1996) (Conf. Rep.). (Emphasis supplied.)

² This provision was added as section 424a(a) of the Home Rule Act (D.C. Official Code § 1-204.24a(a)).

³ Another FRMAA provision, codified at D.C. Official Code § 47-391.01(a) (2005 Repl.), was the establishment of the Financial Responsibility and Management Assistance Authority, better known as the Financial Control Board. The Board suspended its operations on September 30, 2001, when the District achieved its fourth consecutive balanced budget.

⁴ The provision was never codified.

Although the 1997 Appropriations Act provision pertained to the District CFO's authority during a Financial Control Board period, Congress later extended and broadened the District CFO's personnel authority to apply to non-control years. *See, e.g.*, section 111(c) of the District of Columbia Appropriations Act, 2002, approved December 21, 2001, Pub. L. 107-96, 116 Stat. 820; section 336 of the District of Columbia Appropriations Act, 2005, approved October 18, 2004, Pub. L. 108-335, 118 Stat. 1322.

Most recently, in 2006, Congress further clarified the District CFO's personnel authority by adding a new provision to the Home Rule Act that is codified at D.C. Official Code § 1-204.25 (2010 Supp.).⁵ The new section, headlined "Authority of Chief Financial Officer over Personnel of Office and Other Financial Personnel," provides, in pertinent part, as follows:

(a) In General. **Notwithstanding any provision of law or regulation...**employees of the Office of the Chief Financial Officer of the District of Columbia, **including personnel described in subsection (b)**, shall be appointed by, shall serve at the pleasure of, and shall act under the direction and control of the Chief Financial Officer of the District of Columbia[.](Emphasis supplied.)

(b) Personnel. The personnel described in this subsection are as follows:

(3) The heads and all personnel of the subordinate offices of [OCFO] and the Chief Financial Officers, Agency Fiscal Officers, and Associate Chief Financial Officers of **all** District of Columbia executive branch subordinate and **independent agencies...**, together with all other District of Columbia accounting, budget, and financial management personnel (**including personnel of executive branch independent agencies**, but not including personnel of the legislative or judicial branches of the District government). (Emphasis supplied.)

In sum, Congress saw what it considered to be a problem and, in progressively clearer terms, has addressed it by providing the District CFO with broad powers over all public funds belonging to the District, or under its control, as well as the finances and financial personnel of all the District's subordinate and independent agencies.⁶ In light of this clear and unambiguous legislative history, DCHA cannot reasonably contend that it alone stands outside the reach of this congressional legislation amending the Home Rule Act, which necessarily informs and takes precedence with respect to all legislation adopted by the District government, including the local legislation establishing DCHA.

⁵ The new provision was added by section 202(a)(1) of the District of Columbia Appropriations Act, 2006, approved October 16, 2006, 109 Pub. L. 109-356, 120 Stat. 2019. This law inadvertently numbered the new provision of the Home Rule Act as "424a", although there was already a section 424a. Thus, the codifier properly treated the new provision instead as section "425".

⁶ See also the attached copy of Attorney General Robert J. Spagnoletti's February 16, 2006 memorandum to then-City Administrator Robert C. Bobb (concluding that the District CFO has personnel authority over the financial personnel for the independent Water and Sewer Authority). In 2008, the Water and Sewer Authority obtained express congressional exemption from the District CFO's control. *See* D.C. Official Code § 1-204.25(e) (2010 Supp.).

II. DCHA

By 1992, the Department of Public and Assisted Housing (DPAH) was plagued with so many problems that applicants on the housing waiting list sued in the Superior Court of the District of Columbia to seek redress. *See* Report of the Committee on Consumer and Regulatory Affairs on Bill 13-169, the District of Columbia Housing Authority Act of 1999, at 2 (Council of the District of Columbia, November 15, 1999) (DCHA Committee Report). The Council, recognizing the “serious deficiencies” with DPAH, replaced it with the immediate predecessor agency of DCHA, which was also known as the District of Columbia Housing Authority. *Id.* (citing the District of Columbia Housing Authority Act of 1994 (1994 Act), effective March 21, 1995, D.C. Law 10-243, 42 DCR 91).⁷ The 1994 Act was intended to provide “the tools to begin transforming the Housing Authority from a troubled public housing authority to a high performing housing authority.” *Id.* However, several months later, the court appointed a receiver to take control of, and operate, the new entity. *Id.*

Progress was fortunately made, and, in anticipation of the end of court-ordered receivership, the Council found that “it [was] time to insure that the form of governance of the rejuvenated DCHA in the post-Receivership period [was] designed to prevent the policies, practices, and influences that led to its predecessor’s downfall.” *Id.* at 3. Accordingly, the Council passed the District of Columbia Housing Authority Act of 1999 (1999 Act), effective May 9, 2000, D.C. Law 13-105, D.C. Official Code § 6-201 *et seq.* (2008 Repl. & 2010 Supp.). In so doing, the Council repealed the 1994 Act⁸ and established the current DCHA as “an independent authority of the District,” with “a legal existence separate from the District government.” *See* section 3(a) of the 1999 Act (D.C. Official Code § 6-202(a)).

Given the importance, for present purposes, that DCHA places on its establishment as an independent authority of the District, the subject warrants some additional analysis.

A. DCHA is Part of the District Government and Subject to All Requirements of the Home Rule Act

The District’s government was created as a municipal corporation and

is constituted a body corporate for municipal purposes, and may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of this Code.⁹

⁷ As explained in the text below, the 1994 Act was subsequently repealed.

⁸ *See* section 30 of the 1999 Act (uncodified).

⁹ Section 1 of An Act to Provide a Government for the District of Columbia, approved February 21, 1871 (16 Stat. 419; D.C. Official Code § 1-102 (2006 Repl.)). *See also* section 717(a) of the District of Columbia Home Rule Act (Home Rule Act), approved December 24, 1973, 87 Stat. 779, D.C. Official Code § 1-207.17(a) (2006 Repl.).

Title IV of the Home Rule Act established a Charter for the District which provides for the District's current means of governance and delegates certain legislative powers to the District. The Home Rule Act serves as an enabling act, determining what the District, through its three branches of government, can and cannot do. Section 404 of the Home Rule Act (D.C. Official Code § 1-204.04 (2006 Repl.)), delegates certain legislative powers to the Council. Among those powers, as set out in section 404(b) of the Home Rule Act, is the Council's power to:

create, abolish, or organize, any office, agency, department, or **instrumentality of the government of the District** and to define the powers and duties, and responsibilities of any such office, agency, department, or instrumentality.
(Emphasis supplied.)

Similarly, section 422(12) of the Home Rule Act (D.C. Official Code § 1-204.22(12) (2010 Supp.)) authorizes the Mayor to

Reorganize the offices, agencies, and other entities within the executive branch of the government of the District by submitting to the Council a detailed plan of such reorganization.

An early home rule law of the District government, the Governmental Reorganization Procedures Act of 1981, effective October 17, 1981, D.C. Law 4-42, D.C. Official Code § 1-315.01 *et seq.* (2006 Repl.)), implements these Charter provisions and reflects the Council's and the Mayor's joint understanding that sections 404(b) and 422(12) of the Home Rule Act limit the District government's power to create or reorganize offices, agencies, departments, authorities, and instrumentalities only to entities that are a part of the District government itself. Indeed, this Office reached this conclusion in another formal opinion by one of my predecessors. *See* pp. 2-4 of the attached copy of Interim Attorney General Eugene A. Adams's December 8, 2006 opinion to then-Mayor Anthony A. Williams (concluding, among other things, that the former National Capital Revitalization Corporation – which was governed by statutory enabling language identical to that of DCHA – was part of the District government).

The Council and the Mayor clearly have the authority under the Home Rule Act to create or to reorganize an instrumentality of the District government and define its powers, duties, and responsibilities. The power to create or to reorganize an entity outside of the District government has never been granted by Congress to the Council or to the Mayor.

Because Congress has never granted such power, the District government cannot create any office, agency, department, authority, instrumentality, or other entity that is outside the District government. Construing the 1999 Act to the maximum extent of the Council's powers, the description of DCHA as "an independent authority of the District," with "a legal existence separate from the District government" – standard, boilerplate language that has appeared in many of the enabling laws for the District's independent agencies – means that DCHA, while still a part of the District government, is nevertheless independent and separate from other agencies, including the administrative control of the Executive Office of the Mayor.

The legislative history of the 1999 Act reflects the Council's intent that DCHA be a part of the District government. For example, the DCHA Committee Report, at 3, states:

The Committee also believes that under limited circumstances **and only after first submitting a resolution for the approval of the Council of the District of Columbia (as does the National Capital Revitalization Corporation ("NCRC") and the District of Columbia Housing Finance Agency ("HFA"))**, DCHA should be endowed with the powers of eminent domain and with the ability to issue tax-exempt Obligations [sic] to enable the DCHA to fulfill its role as a provider of safe, sound and sanitary housing for low and moderate income persons and families in the District of Columbia. (Emphasis supplied.)

The 1999 Act itself, through provisions that were part of the original legislation or were added later, expressly reserves substantial Council control and oversight of DCHA activities. For example, and perhaps most relevant here, section 3(d) of the 1999 Act (D.C. Official Code § 6-202(d)) provides that DCHA "shall expend, and account for the expenditure of, funds **in the same manner as all other agencies of the District government.**" (Emphasis supplied.) This provision was added by section 2022 of the Fiscal Year 2006 Budget Support Act of 2005, effective October 20, 2005, D.C. Law 16-33, 52 DCR 7503, "to provide for Council oversight of funds provided by [sic] the District to the Housing Authority." See Report of the Committee of the Whole on Bill 16-200, the Fiscal Year 2006 Budget Support Act of 2005, at 15 (Council of the District of Columbia May 10, 2005).

On the subject of oversight, it is worth noting that the Council can be presumed to have known about the CFO's authority over the finances and financial personnel of the District's independent agencies when it passed the 1999 Act. See, e.g., *Scholtz Partnership v. District of Columbia Rental Accommodations Com'n.*, 427 A.2d 905, 916 (D.C. 1981) ("the legislature is presumed to know [the] law"). Congress had, by 1999, made its intentions explicitly clear that the District's CFO would supervise and control the financial operations and staff of both subordinate and independent agencies of the District government. The Council was also presumptively aware of a recent formal opinion in which the Corporation Counsel had concluded that independent agencies of the District government were bound to submit their contracts in excess of \$1 million in a 12-month period for Council approval under section 451(b) of the Charter. See the attached copy of Corporation Counsel Charles F. C. Ruff's May 10, 1996 opinion to the then-General Counsel to the Council, Charlotte Brookins-Hudson (opining with respect to the obligations of the independent Washington Convention Center Authority). Other examples of the Council's reservation of control in the 1999 Act include section 5(a) (D.C. Official Code § 6-204(a)) ("Absent an agreement with [DCHA] approved by the Council, for-profit activities shall not be exempt from District taxation.") and section 26a(c) (D.C. Official Code § 6-226(c) (2010 Supp.)) ("[DCHA] shall promulgate rules, subject to Council approval, as required in §§ 6-227 and 6-228, which shall govern the distribution of funds under [the Rent Supplement Program].").

The foregoing analysis makes it clear that DCHA is part of the District government and must account for its funds in exactly the same way as all other agencies of the District government, including subordinate and independent agencies. This conclusion is further reinforced by the definition of "District instrumentality" in section 490(n)(2) of the Home Rule Act (D.C. Official Code § 1-204.90(n)(2) (2006 Repl.)), which means "any agency or instrumentality (**including an**

independent agency or instrumentality), authority, commission, board, department, division, office, body, or officer of the District of Columbia government duly established by an act of the Council or by the laws of the United States, whether established before or after August 5, 1997.” (Emphasis supplied.) Accordingly, as part of the District government, DCHA is subject to all the requirements of the Home Rule Act pertaining to District government subordinate and independent agencies, including the authority of the District CFO to supervise and control DCHA’s financial operations and staff.

B. DCHA’s Receipt of Federal Funds

DCHA also relies for its position on the fact that it receives funding from HUD. Such funding, in and of itself, is no basis on which to distinguish DCHA from the several other independent and Executive Branch subordinate agencies of the District government that receive all or most of their funds from the federal government.

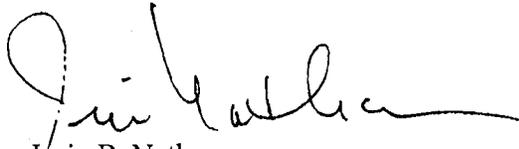
More to the point, the funds received by DCHA from HUD are public funds of the District government by virtue of the fact that DCHA is, as concluded above, part of the District government. Even if such funds were not owned by the District government, the District CFO’s authority extends to maintaining custody of all funds in possession of the District government in a fiduciary capacity. *See* D.C. Official Code § 1-204.24d(12) (“Maintaining custody of all investment and invested funds of the District government or in possession of the District government in a fiduciary capacity[.]”).

Furthermore, HUD itself has commented on the sometimes conflicting nature of federal and state requirements. In the Procurement Handbook for Public Housing Agencies (Handbook No. 7460.8 REV 2 (Feb. 2007)), at 13-1, for example, HUD states that “[s]ome State public housing laws also provide guidance on specific operational tasks, such as procurement actions **with which the [Public Housing Authorities] must comply.**” (Emphasis supplied.) Consequently, the fact that DCHA receives funding from HUD does not alter my conclusion that the District CFO has the authority to supervise and to control the financial functions and financial personnel of DCHA.

CONCLUSION

For the foregoing reasons, it is the considered and binding opinion of this Office that the District’s CFO has the authority to supervise and to control the financial functions and financial personnel of the DCHA.

Sincerely,



Irvin B. Nathan
Acting Attorney General
for the District of Columbia

Attachments (as stated)

cc: Mayor Vincent C. Gray

Allen Y. Lew, City Administrator

Brian K. Flowers, General Counsel to the Mayor

Dr. Natwar Gandhi, Chief Financial Officer

Janene D. Jackson, Director, Office of Policy and Legislative Affairs