

Government of the District of Columbia

OFFICE OF THE CORPORATION COUNSEL

JUDICIARY SQUARE

441 FOURTH ST., N.W.

WASHINGTON, D. C. 20001



IN REPLY REFER TO:

LCD:LED:led
(AL-98-370)

December 7, 1998

OPINION OF THE CORPORATION COUNSEL

SUBJECT: Does the Inspector General have authority to require the production of documents from the District of Columbia Housing Authority (DCHA) and the testimony of DCHA employees?

E. Barrett Prettyman, Jr.
Inspector General
Office of the Inspector General
717 Fourteenth Street, N.W., 5th Floor
Washington, D.C. 20005

Dear Mr. Prettyman:

This responds to your August 21, 1998, letter to me requesting a formal opinion addressing the above-noted question. For the reasons that follow, I conclude that the Inspector General does have authority to require the production of documents from the District of Columbia Housing Authority ("DCHA") and the testimony of DCHA employees.

I. General Powers of OIG

As you know, the Office of the Inspector General ("OIG"), created originally by executive order, was established statutorily by section 208 (the "IG Act") of the District of Columbia Procurement Practices Act of 1985 ("PPA").¹ Created within the executive branch of the District

¹ District of Columbia Procurement Practices Act of 1985, effective February 21, 1986, D.C. Law 6-85, as amended by section 303(a)-(d) of the District of Columbia Financial Responsibility and Management Assistance Act ("FRMA Act"), approved April 17, 1995, Pub. L. 104-8, 109 Stat. 148-151 and as further amended by section 11601(b)(3) of the National Capital

government, the OIG has the duty, among other things, to "[c]onduct independent fiscal and management audits of District government operations," "[a]ct as liaison representative for the Mayor for all external audits of the District government," "annually conduct an operational audit of all procurement activities carried out pursuant to [the PPA]," "[f]orward to the Mayor and the appropriate authority any evidence of criminal wrongdoing that is discovered as a result of any investigation or audit conducted by the [OIG]," and "audit the complete financial statement and report on the activities of the District government for [a] fiscal year, for the use of the Mayor [during a non-control year and the CFO during a control year] under section 448(a)(4) of the Home Rule Act [D.C. Code § 47-310(a)(4) (1997 Repl.)." See IG Act as amended, D.C. Code § 1-1182.8(a)(3)(A), (B), (D), (E), (F), and (H).

In 1995, the congressionally-enacted FRMA Act amendments to the IG Act, which expanded the duties of the Inspector General, gave the Inspector General the power to issue subpoenas "requiring the attendance and testimony of witnesses and the production of any evidence relating to any matter under investigation by the Inspector General." IG Act as amended, D.C. Code § 1-1182.8(c)(2)(A) (1998 Supp.). The FRMA Act amendments also gave the Inspector General the authority to apply for enforcement of these subpoenas in the Superior Court of the District of Columbia. IG Act as amended, D.C. Code § 1-1182.8(c)(2)(B) (1998 Supp.). In addition, the Inspector General has been delegated the Mayor's power to issue subpoenas and administer oaths.² Accordingly, the Inspector General and his delegates are empowered to the same extent as the Mayor to issue subpoenas and to administer oaths "in any investigation or examination of any municipal matter," constrained only by the limits of the Inspector General's lawful authority to undertake the investigation or examination of "municipal matters" under the IG Act.

Revitalization and Self-Government Improvement Act, approved August 5, 1997, Pub. L. 105-33, 111 Stat. 777, D.C. Code § 1-1182.8 (1998 Supp.).

² Pursuant to section 3 of the Independent Personnel Systems Implementation Act of 1980, effective September 26, 1980, D.C. Law 3-109, D.C. Code § 1-338(a) (1992 Repl.), the Mayor is authorized to issue subpoenas "in any investigation or examination of any municipal matter with respect to functions transferred to the Mayor by Reorganization Plan No. 3 of 1967 or by the [Home Rule Act]." The Mayor is further authorized "to administer oaths to witnesses summoned in any investigation or examination as set out in subsection (a)." Independent Personnel Systems Implementation Act § 3(d), D.C. Code § 1-338(d). By executive order dated October 31, 1990, the Mayor delegated to the Inspector General of the District of Columbia his authority, pursuant to D.C. Code § 1-338, "to issue subpoenas and to administer oaths to witnesses in any investigation or examination of any municipal matter." Mayor's Order 90-146(1). Mayor's Order 90-146 further stipulated that "[t]he authority delegated herein may be further delegated by the Inspector General to subordinates under his or her jurisdiction." Mayor's Order 90-146(2).

II. Status of DCHA as an Independent Agency Within the District Government

The District of Columbia Housing Authority, established as the successor to the Department of Public and Assisted Housing ("DPAH") by the District of Columbia Housing Authority Act of 1994 ("DCHA Act"), effective March 25, 1995, D.C. Law 10-243, D.C. Code § 5-122 (1998 Supp.), is "a corporate body which has a legal existence separate from the District government but which is an instrumentality of the District government[.]" DCHA Act § 4, D.C. Code § 5-122(a). Pursuant to an order entered by consent in the Superior Court for the District of Columbia in May of 1995, DPAH was placed under the control of a court-appointed Receiver shortly before the transition from DPAH to DCHA was completed. The Receiver remains in control of DCHA to date. The receivership order provides:

The Receiver shall have the following authority and powers necessary to carry out his duties and responsibilities, including but not limited to . . . All powers over DPAH hitherto exercised by the Mayor of the District of Columbia[.]³

Under both the DCHA Act and the receivership order, therefore, DCHA is an independent agency not subject to the administrative authority of the Mayor, but otherwise subject to all applicable District laws, except as specifically exempted.⁴

III. DCHA Is Not Exempt From the Authority of the IG

A. Exemption from the procurement requirements of the PPA does not exempt DCHA from the IG Act.

Even if it is still in force after the 1997 amendment to the PPA discussed below, the exemption contained in the DCHA Act -- which provides that DCHA is not bound by the PPA (of which the IG Act is a part) -- does not excuse DCHA from compliance with any lawful

³ Order of the Court in Catherine D. Pearson, et al. v. Kelly, et al., Civil Action No. 92-CA-14030, May 19, 1995 (Sup. Ct. D.C.), at 5.

⁴ Two provisions of the receivership order, note 3, *supra*, support the view that DCHA remains bound by local law except as expressly exempted by the Court. First, the order states that it is the duty and responsibility of the Receiver to "transform DPAH into a public housing authority that provides 'safe, decent, and sanitary' housing . . . in compliance with all applicable housing codes, laws, and HUD regulations[.]" Order at 3 (emphasis added). Second, the order gives the Receiver authority "to declare an emergency and, with Court approval, to waive local regulations where such regulations clearly prevent the Receiver from carrying out the duties and responsibilities" set forth in the Order. Order at 9 (emphasis added). Thus, the order assumes that the Receiver is bound by local regulations except in the event of an emergency, and only then if the Court approves a waiver.

investigation initiated by OIG.⁵ Section 11 of the DCHA Act, captioned "Procurement," states: "The [Housing] Authority shall be exempt from the District of Columbia Procurement Practices Act of 1985, effective February 21, 1986 (D.C. Law 6-85; D.C. Code § 1-1181.1 *et seq.*)." Read in context, it is clear that the Council's intent was limited to exempting DCHA from the PPA's provisions with respect to procurement only. The legislative history of the DCHA Act supports this view. In its section-by-section analysis of the DCHA Act, the Committee on Housing described the purposes of section 11 of the Act, as follows:

Bars DCHA employees designated to do purchasing, from having material interest in the purchasing contract; and provides that DCHA shall develop its own procurement process without being subject to District's laws on agency procurement.

Report of the Committee on Housing, dated October 24, 1994, at 22 (emphasis added).

In any event, unlike the procurement provisions of the PPA, which create affirmative obligations with which agencies covered by the PPA must comply, the IG Act provisions do not purport to apply directly to specified agencies. Rather, the IG Act, by its terms, imposes duties and confers powers on the Inspector General, who may then exercise the powers of his office in furtherance of any lawful investigation within the scope of his authority. Nothing in the IG Act limits the authority of the Inspector General to conduct investigations only of agencies covered by the PPA's procurement provisions, nor is such a limitation on his powers necessarily implied. Accordingly, I conclude that exemption from the PPA does not, in itself, remove an agency from the scope of any lawful investigation otherwise within the authority of OIG.

Furthermore, the applicability of the PPA was broadened dramatically in 1997, through passage of the Procurement Reform Amendment Act of 1996 ("Procurement Reform Act"), effective April 12, 1997, D.C. Law 11-259. Section 101(b) of the Procurement Reform Act

⁵ It is important to note that exemption from the PPA does not exempt an entity from compliance with a subpoena issued by OIG in support of a lawful investigation. Under both the IG Act and the power delegated to the Inspector General by the Mayor, the Inspector General "may issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence relating to any matter under investigation by the Inspector General," to anyone, including parties wholly outside the District government to whom the PPA clearly does not apply. Indeed, the IG Act specifically distinguishes between "books, accounts, records, reports, findings, and all other papers, things, or property belonging to or in use by any department or agency under the direct supervision of the Mayor," to which the Inspector General shall have access without need of a subpoena, D.C. Code § 1-1182.8(c)(1), and witnesses and evidence outside the executive branch, which the Inspector General may subpoena pursuant to D.C. Code § 1-1182.8(c)(2).

redefined the applicability of the PPA, amending section 104 of the PPA, D.C. Code § 1-1181.4(a), to read:

Except as provided in section 320 [D.C. Code § 1-1183.20], this act shall apply to all departments, agencies, instrumentalities, and employees of the District government, including agencies which are subordinate to the Mayor, independent agencies, boards, and commissions, but excluding the Council of the District of Columbia, District of Columbia courts, and the District of Columbia Financial Responsibility and Management Assistance Authority.

Section 320 of the Procurement Reform Act, D.C. Code § 1-1183.20, contains a list of eleven exemptions, naming a number of independent boards, agencies, and commissions; DCHA, however, is not on the exempted list.

Concurrently, Congress, through the FRMA Act, had expanded the scope of the IG Act. The legislative intent to provide OIG with additional authority to reach agencies other than those subordinate to the Mayor is evidenced in the statutory enactment of the Inspector General's subpoena power pursuant to section 303(b)(3) of the District of Columbia Financial Responsibility and Management Assistance Act ("FRMA Act"), approved April 17, 1995, Pub. L. 104-8, 109 Stat. 97, D.C. Code § 1-1182.8(c)(2) (1998 Supp.). Under the terms of the PPA as it stood at the time of the DCHA Act, although the Inspector General had been delegated the Mayor's subpoena power by Mayoral Order, the Inspector General's statutory power to gain compulsory access to evidence was limited to tangible evidence "belonging to or in use by" departments and agencies under direct supervision of the Mayor -- terms that excluded DCHA (an independent agency) irrespective of the exemption from the PPA contained in the DCHA Act. The FRMA Act, however, gave the IG broad statutory power to issue subpoenas, without restriction. In the FRMA Act, Congress also expanded the Inspector General's mandate, to empower him to "undertake reviews and investigations, and make determinations or render opinions as requested by the [Financial Responsibility and Management Assistance] Authority." FRMA Act § 303(b)(3), D.C. Code § 1-1182.8(c)(2).⁶

⁶ Under the IG Act as amended, the Inspector General has the duty, among other things, to "[c]onduct independent fiscal and management audits of District government operations," "[a]ct as liaison representative for the Mayor for all external audits of the District government", and "audit the complete financial statement and report on the activities of the District government for [a] fiscal year." IG Act as amended, D.C. Code § 1-1182.8(a)(3) (emphasis added). DCHA is a part of the "District government" within the meaning of the IG Act. Under the IG Act, the term "District government" has the same meaning as under section 305(5) of the FRMA Act, D.C. Code § 47-393(5), *i.e.*, "any department, agency or instrumentality of the government of the District of Columbia; any independent agency of the District of Columbia established under Part F of Title IV of the [Home Rule Act] or any other agency, board, or commission established by the Mayor or the Council; . . . and any other agency, public authority, or public benefit corporation which has the authority to receive monies directly or indirectly from the District of Columbia

These subsequent amendments to the PPA and the IG Act, part of a larger effort (1) to better define the procurement obligations of the independent agencies, and (2) to expand the power of the Inspector General to combat perceived corruption and mismanagement throughout District government, being later in time, must be construed as having superseded any inconsistent provision (*i.e.*, the PPA exemption) in the earlier DCHA Act. See, e.g., Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Commission, 626 F.2d 1020, 1022 (D.C. Cir. 1980); 1A Sutherland Statutory Construction § 23.09 (5th ed. 1993).

B. The Receiver's exercise of the Mayor's powers does not preempt OIG's authority with respect to DCHA.

As noted previously, the Receiver for DCHA has been given the powers hitherto exercised by the Mayor over DPAH. It does not follow, however, that DCHA is thereby immune from oversight by OIG simply because OIG is an executive branch agency. The Inspector General's power is not derivative of the Mayor's, and therefore was not delegated to the Receiver with the Mayor's power. Rather, the powers and responsibilities denominated in the IG Act were given to the Inspector General directly by legislation. The authority of OIG, therefore, to "[c]onduct independent fiscal and management audits of District government operations," and to "requir[e] the attendance and testimony of witnesses and the production of any evidence relating to any matter under investigation by the Inspector General" continue to extend to DCHA, notwithstanding the receivership.

C. The Receiver's quasi-judicial immunity does not preclude the enforcement of District law against the agency under the Receiver's control.

"The receiver is an officer of the court which appoints him." Taylor v. Sternberg, 293 U.S. 470, 472 (1935). As such, the receiver himself enjoys quasi-judicial immunity against liability for actions taken by him in the discharge of his duties. See generally, Capitol Terrace, Inc. v. Shannon & Luchs, Inc., 564 A.2d 49, 52 (D.C. App. 1989), and cases cited therein. It does not follow, however, that the agency under the Receiver's control is immune from the enforcement authority of OIG. It has been held that "[t]he courts of a jurisdiction cannot authorize violations of that jurisdiction's laws, unless pursuant to the command of a higher law. It

[government] (other than monies received from the sale of goods, the provision of services, or the loaning of funds to the District of Columbia [government]" Given that the DCHA Act expressly establishes DCHA as an instrumentality of the District government and that DCHA clearly comes within the above-quoted definition of "District government," there can be no doubt that the Inspector General's earlier-quoted investigatory jurisdiction -- namely, to conduct independent fiscal and management audits of "District government" operations, to act as liaison representative for all external audits of the "District government," to audit the complete financial statement and report on the activities of the "District government" for each fiscal year, and to forward to the appropriate authorities any evidence of criminal wrongdoing discovered as a result of such audits -- encompasses DCHA, absent an applicable exemption.

is a fundamental tenet of separation-of-powers doctrine that a court's enforcement powers are restricted by the dictates of the legislature." LaShawn v. Barry, 144 F.3d 847, 853 (D.C.Cir. 1998). A court-appointed receiver "has only such power and authority as are given him by the court, and must not exceed the prescribed limits." Davis v. Gray, 83 U.S. 203, 218 (1862), cited with approval in Capitol Terrace, *supra*. Here, the legislature has empowered OIG to subpoena evidence relating to any matter under investigation by the Inspector General; I find nothing in the receivership order or in the circumstances of the receivership to indicate that the Court has authorized (or intended) DCHA to violate the IG Act by disregarding or frustrating OIG's authority to require the production of documents by DCHA or testimony from DCHA employees.

IV. Conclusion

Based on the foregoing, it is my opinion that the Inspector General's statutory mandate to "[c]onduct independent fiscal and management audits of District government operations," IG Act as amended, D.C. Code § 1-1182.8(3)(A), gives OIG lawful authority to investigate the operations of DCHA, and that DCHA and its employees are subject to the subpoena power of the Inspector General and can be compelled to respond to any request for documents or testimony properly made pursuant to a lawful investigation or audit by OIG.

Sincerely,



John M. Ferren
Corporation Counsel

cc: David Gilmore
Receiver
District of Columbia Housing Authority

Kim Kendrick
General Counsel
District of Columbia Housing Authority

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B. The Receiver's exercise of the Mayor's powers does not preempt OIG's authority with respect to DCHA.

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C. The Receiver's quasi-judicial immunity does not preclude the enforcement of District law against the agency under the Receiver's control.

"The receiver is an officer of the court which appoints him." Taylor v. Sternberg, 293 U.S. 470, 472 (1935). As such, the receiver himself enjoys quasi-judicial immunity against liability for actions taken by him in the discharge of his duties. See generally, Capitol Terrace, Inc. v. Shannon & Luchs, Inc., 564 A.2d 49, 52 (D.C. App. 1989), and cases cited therein. It does not follow, however, that the agency under the Receiver's control is immune from the enforcement authority of OIG. It has been held that "[t]he courts of a jurisdiction cannot authorize violations of that jurisdiction's laws, unless pursuant to the command of a higher law. It

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IV. Conclusion

Based on the foregoing, it is my opinion that the Inspector General's statutory mandate to "[c]onduct independent fiscal and management audits of District government operations," IG Act as amended, D.C. Code § 1-1182.8(3)(A), gives OIG lawful authority to investigate the operations of DCHA, and that DCHA and its employees are subject to the subpoena power of the Inspector General and can be compelled to respond to any request for documents or testimony properly made pursuant to a lawful investigation or audit by OIG.

Sincerely,



John M. Ferren
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