

Government of the District of Columbia

OFFICE OF THE CORPORATION COUNSEL

DISTRICT BUILDING

WASHINGTON, D. C. 20004



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December 23, 1983

OPINION OF THE CORPORATION COUNSEL

SUBJECT: Whether the District of Columbia Auditor has the authority to audit the operations of and funds managed by the District of Columbia Retirement Board.

Mr. Otis H. Troupe
District of Columbia Auditor
415 12th Street, N.W., Room 210
Washington, D.C. 20004

Dear Mr. Troupe:

This is in response to your letter of August 23, 1983 requesting an opinion as to whether you have the authority to conduct an audit of the District of Columbia Retirement Board. You note that the Retirement Board has taken exception to your position that you do have such authority. The Retirement Board's position has been stated in two letters, dated July 28, 1983 and August 15, 1983, addressed to you from Mr. Frank A. Higgins, Chairman of the Retirement Board. In the first letter Chairman Higgins stated in pertinent part:

Please be advised that the Board is of the opinion that your office lacks the authority to conduct the contemplated audit. As you know, the Board was established by the District of Columbia Retirement Reform Act [DCRRA], an Act of Congress which post-dates your enabling legislation. That Act nowhere makes provision for an audit of the Board's activities, books or records by your office. More importantly, such an audit is incompatible with the specific procedures established by Congress for review of the Board's affairs. In this regard, the Act requires the

Board to engage an independent qualified public accountant to conduct an annual audit of the Fund. The results of the independent accountant's audit are included in the annual report of the Board which is filed with the Mayor, the City Council, and the Congress, as well as made available to the Fund's participants and beneficiaries. The Mayor, City Council, or Congress, of course, may reject this report and, ultimately, require an additional audit of the Board to be conducted. However, even if the Mayor or City Council were to take this step, the statute does not envision that such an audit would be conducted by your office. Rather, it specifically requires that the Mayor or City Council also retain an independent qualified public accountant to perform the audit.

In our view, the statutory provisions noted above make clear that the Board is not subject to audit by the Office of the District of Columbia auditor, but only by an independent third party. Moreover, this view is consistent with the overall design of the statute which contemplates that the Board is to operate as an independent entity, free from the direction and control of the City Government. Because we believe that this independence is essential if we are to discharge the broad fiduciary responsibilities imposed on us by the Act in the manner Congress envisioned, we must take exception to your attempt to subject the Board to the City's normal audit process.

And in the second letter, Chairman Higgins stated in pertinent part:

In our view, the comprehensive audit procedures contained in the DCRRA evidence an intent of Congress to exempt the Retirement Board from the City's normal audit process. Further support for this view is found in the D.C. Appropriations Act for the Fiscal Years 1982 and 1983, Public Law Nos. 97-91 and 97-378, which establish specific procedures encompassing the Board's reporting requirements to Congress and the City Government.

An analysis of the question properly begins with an examination of the statutory provisions relating to the Auditor's authority to conduct audits. In this regard D.C. Code 1981, §§47-117(b) and (c) provide:

(b) The District of Columbia Auditor shall each year conduct a thorough audit of the accounts and operations of the government of the District in accordance with such principles and procedures and under such rules and regulations as he may prescribe. In the determination of the auditing procedures to be followed and the extent of the examination of vouchers and other documents and records, the District of Columbia Auditor shall give due regard to generally accepted principles of auditing including the effectiveness of the accounting organizations and systems, internal audit and control, and related administrative practices.

(c) The District of Columbia Auditor shall have access to all books, accounts, records, reports, findings and all other papers, things, or property belonging to or in use by any department, agency, or other instrumentality of the District government and necessary to facilitate the audit. [Emphasis added.]

These broadly phrased provisions have their origin in section 455 of the District of Columbia Self-Government and Governmental Reorganization Act of 1973, Public Law 93-198, 87 Stat. 774, 803-04 (hereinafter "Home Rule Act"). The legislative history of section 455 confirms what the statutory language facially indicates, namely that the audit authority of the District of Columbia Auditor was intended to be comprehensive. In the Conference Report on S. 1435, 93rd Cong. 1st Sess., the following is stated in this regard:

The House amendment included provisions, not in the Senate bill, which established the office of District of Columbia Auditor, appointed by the Chairman of the Council, subject to Council approval, for a six-year term, who would conduct a yearly review of all accounts and operations of the D.C. government and submit his reports and recommendations to the Congress, the Mayor, and the Council.

The Conference substitute (section 455) conforms to the House amendment. [Emphasis added.]

H.R. Rept. 93-703, 93rd Cong. 1st Sess. 79 (1973). See also Home Rule for the District of Columbia, 1973-1974. Background and Legislative History of H.R. 9056, H.R. 9682 and Related Bills culminating in the District of Columbia Self-Government and Governmental Reorganization Act, p. 3017 (hereinafter "Home Rule Act Legislative History").

In his remarks on the House floor on December 7, 1973, Congressman Charles C. Diggs, Jr. stated in pertinent part:

Legal and proper expenditure of all District funds is also safeguarded through three separate audits in the House-passed version and retained in Conference. First, the Mayor's office conducts an internal audit of all accounts, operations and agency records to verify that bills paid are in fact legal transactions. Second, there is created an Office of the District of Columbia Auditor. The Auditor is selected and approved by the Council and conducts on an ongoing basis a thorough review of all the city's accounts and operations. The Auditor/Council relationship is modeled after the GAO/Congress relationship. Third, the report authorizes an independent annual audit by the General Accounting Office of the accounts and operations of the District to determine if programs are being conducted in an efficient

and effective manner and in line with the purposes for which the moneys were appropriated. Such an audit by GAO would, of course, include the proper expenditure of the Federal payment to the District. GAO will submit its audit reports to the Congress, the Mayor, and the Council and the Mayor is required within a 90-day time limit to respond to this report. In the program performance statement of the budget the Mayor is also required annually to indicate progress being made to comply with audit reports. [Home Rule Act Legislative History, 3037; emphasis added.]

As noted, supra, the Retirement Board takes the position that in enacting in 1979 the District of Columbia Retirement Reform Act, Public Law 96-122, 93 Stat. 866, D.C. Code 1981, § 1-701 et seq., Congress intended to circumscribe the comprehensive audit authority conferred upon the District of Columbia Auditor in the Home Rule Act. However it is impossible, as the Retirement Board appears to recognize, to discern such an intention directly from the language of the Retirement Reform Act or from its legislative history. For nowhere in either is the District of Columbia Auditor ever mentioned. The Retirement Board asserts that such an intention can and must be inferred (1) from the fact that the Retirement Board is an "independent" agency and (2) from the fact that its financial statements must be examined by "an independent qualified [i.e., certified] public accountant." See D.C. Code 1981, §§1-711(a) and 1-732(a)(3)(A). This argument is not persuasive.

First, D.C. Code 1981, §47-117 makes no distinction between agencies subject to direction by the Mayor and independent agencies. The relevant question with regard to whether an agency is within the purview of §47-117 is whether the agency is an agency "of the District government." D.C. Code 1981, §47-117(c). In this regard the Retirement Board's statute states that the Board is "an independent agency of the government of the District of Columbia," D.C. Code 1981, §1-711(a), emphasis added.

Second, the fact that Congress has required the Retirement Board to engage an independent certified public accountant to examine its financial statements cannot be said to indicate that Congress thereby intended to restrict the audit authority of the District of Columbia Auditor vis-a-vis the Retirement Board. A system of multiple audits is not inconsistent with congressional policy. See remarks of Congressman Diggs, quoted above. See also Pub. Law 94-399, 90 Stat. 1208, D.C. Code 1981, §47-119 (independent annual audit), and Pub. Law 97-258, 96 Stat. 877, D.C. Code 1983 Cum. Supp., §47-118.1 (annual audit by Comptroller General). Moreover, other independent agencies or instrumentalities of the District of Columbia government, which are within the scope of §47-117, are, like the Retirement Board, required or authorized to retain independent certified public accountants to audit their operations and accounts. See D.C. Code 1981, §§45-2111 and 45-2145 relating to the District of Columbia Housing Finance Agency; D.C. Code 1981, §§ 32-211 and 32-243(c) relating to the District of Columbia Hospital Commission; D.C. Code 1981, §§1-2703 and 1-2706 relating to the District of Columbia Public Defender Service. Moreover, the Auditor, as an arm of the Council of the District

of Columbia, cannot be denied access to information concerning funds managed by the Retirement Board since the Council is involved in the appropriation process for such funds.

Furthermore, the conclusion that the District of Columbia Auditor has the authority to audit the Retirement Board is strongly, and indeed conclusively, buttressed by well-established principles of statutory construction. The Retirement Board's position, in effect, asserts the existence of a conflict between D.C. Code 1981, §47-117 and the provisions of the Retirement Reform Act. When two statutes are alleged to be in conflict, the proper interpretive approach, as stated by the Supreme Court in Morton v. Mancari, 417 U.S. 535, 551 (1974), is:

The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible The intention of the legislature to repeal 'must be clear and manifest.'" United States v. Borden Co., 308 U.S. 188, 198 (1939).***
[Emphasis added.]

In this same vein, the District of Columbia Court of Appeals stated in District of Columbia v. Smith, D.C. App., 329 A.2d 128, 130 (1974):

We also have a duty to make "every effort" to reconcile allegedly conflicting statutes and to give effect to the language and intent of both, as long as doing so does not deprive one of the statutes of its essential meaning. Myers v. Hollister, 96 U.S. App. D.C. 388, 390, 226 F.2d 346, 348 (1955), cert. denied, 350 U.S. 987, 76 S. Ct. 474, 100 L. Ed. 854 (1956).***

D.C. Code 1981 §47-117 and the Retirement Reform Act are manifestly "capable of coexistence." Moreover, there is no "clearly expressed congressional intention to the contrary." Morton v. Mancari, *supra*. The existence of authority in the District of Columbia Auditor to audit the "accounts and operations" of the Retirement Board (see D.C. Code 1981, §47-117(b)) does not deprive the provisions of the Retirement Reform Act of their "essential meaning." District of Columbia v. Smith, *supra*. In this regard it should be noted that while the language of D.C. Code 1981, §§47-117(b) and (c) is sufficiently broad to include both the administrative operations of the Retirement Board and the various retirement funds managed by the Board, the Board nevertheless has "exclusive authority and discretion," subject to the requirements of the Retirement Reform Act, "to manage and control the funds established" by the Act. See D.C. Code 1981, §1-711(a). Thus if after an audit of these funds, the Auditor were to make recommendations regarding their management, the Retirement Board is vested with "exclusive authority and discretion" in deciding whether such recommendations will be accepted or rejected.

As noted above, in his letter of August 15, 1983, Retirement Board Chairman Higgins relied upon Public Law Nos. 97-91 and 97-378. These are the District of Columbia Appropriation Acts for the fiscal years 1982 and 1983. Except for the amounts appropriated they contain similar language insofar as they apply to the Retirement Board. Public Law 97-91, 95 Stat. 1174, for example, states in pertinent part:

*** Provided further, That notwithstanding any other provision of law, there is hereby appropriated \$1,348,300 to pay legal, management, investment and other fees and expenses of the District of Columbia Retirement Board of which \$312,700 shall be derived from the general fund and not to exceed \$1,035,600 shall be derived from the earnings of the applicable retirement funds: Provided further, That the District of Columbia Retirement Board shall provide to the Congress a quarterly report of the allocations of charges by fund and of expenditures of all funds: Provided further, That the District of Columbia Retirement Board shall provide the Mayor for transmittal to the Council of the District of Columbia an item accounting of the planned use of appropriated funds in time for each annual budget submission and the actual use of such funds in time for each annual audited financial report. [Emphasis original.]

What has been stated, supra, about the relationship between D.C. Code 1981, §47-117 and the Retirement Reform Act is equally applicable to the relationship between §47-117 and the provisions of Public Law Nos. 97-91 and 97-378 applicable to the Retirement Board.

In sum, it is my opinion that, under D.C. Code 1981, §47-117, the District of Columbia Auditor has the authority to conduct audits of the accounts and operations of the Retirement Board subject to the exclusive authority and discretion of that Board to manage and control the retirement funds established by the 1979 Retirement Reform Act.

Very truly yours,

Inez Smith Reid

Inez Smith Reid
Corporation Counsel, D.C.

CC:

Frank A. Higgins
Chairman
D.C. Retirement Board

David A. Clarke
Chairman
Council of the District of Columbia