

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General



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~~PRIVILEGED AND CONFIDENTIAL~~
~~ATTORNEY-CLIENT COMMUNICATION~~

TO: James Pittman
Deputy Attorney General
Legislative and Intergovernmental Affairs

FROM: Brian K. Flowers *BKF*
Deputy Attorney General
Legal Counsel Division

DATE: May 8, 2020

RE: Legal Analysis – Mayoral Authority to Reduce Budget of the Sentencing
Commission
(AL-20-347)

The Mayor recently informed the Sentencing Commission that she wished to cut the Commission’s budget by \$163,244, in light of budgetary challenges presented by the COVID-19 public health emergency. You asked whether the Mayor may adopt this budgetary change. Under section 453 of the Home Rule Act,¹ she may, but only with Council approval.

Analysis

To answer your question, we interpreted section 453 using ordinary principles of statutory construction, reading the statute “according to its terms.” *Intel. Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 776 (2020). Each undefined term in section 453 bears “that term’s ordinary, contemporary, common meaning . . . when Congress enacted” it. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019). To determine that meaning, we reviewed section 453 against the backdrop of the Home Rule Act and other governing law, since the “words of a statute must be read in their context and with a view to their place in the statutory scheme.” *Davis v. Michigan Dep’t of the Treasury*, 489 U.S. 803, 809 (1989); *In Re Edmonds*, 96 A.3d 683, 687 (D.C. 2014) (same).

¹ Approved Dec. 24, 1973 (87 Stat. 803; D.C. Official Code § 1-204.53).

Section 453, which Congress added to the Home Rule Act in 1991 as part of the District of Columbia Emergency Deficit Reduction Act of 1991 (“1991 Act”),² authorizes the Mayor to reduce an independent agency’s budget. It states that the Mayor may “reduce amounts appropriated or otherwise made available to independent agencies of the District of Columbia . . . for a fiscal year if the Mayor determines that it is necessary to reduce such amounts to balance the District’s budget for the fiscal year.”³ But to do so, the Mayor must “submit[] a proposal to make such a reduction to the Council,” and the Council must approve it.⁴ A proposed budget reduction is deemed approved if either:

- No Councilmember files an objection to the proposed cut within 10 days after the Mayor submits that proposed reduction to the Council; or
- A Councilmember files an objection within that 10-day period, and the Council does not disapprove the proposal within 45 days.⁵

Section 453 allows the Mayor to reduce the Commission’s budget, with Council approval, since the Commission is an independent agency.

Section 453 does not define what constitutes an “independent agency,” so we apply that term’s ordinary, contemporary meaning. In ordinary usage, an “independent agency” is one that is, to a meaningful degree, “not under the direction of the executive.”⁶ Although that definition can invite difficult line-drawing questions, this is how District law used the term in 1991 and continues to use it today. For example, the District of Columbia Administrative Procedure Act (“APA”)⁷ used (and still uses) the phrase “independent agency” to refer to

any agency of the government of the District with respect to which the Mayor and the Council are not authorized by law, other than this act, to establish administrative procedures, but does not include the several courts of the District and the Tax Division of the Superior Court.⁸

²See 1991 Act § 2(a), approved Aug. 17, 1991 (Pub. L. 102-106; 105 Stat. 539).

³ D.C. Official Code § 1-204.53(a).

⁴ *Id.* § 1-204.53(b)(1).

⁵ *Id.* § 1-204.53(b)(2). This review period applies even during the COVID-19 public health emergency. It is true that one of the Council’s most recent emergency measures tolled the review period for many matters subject to Council review. See COVID-19 Response Supplemental Emergency Amendment Act of 2020, § 501(c), effective Apr. 10, 2020 (D.C. Act 23-286; 67 DCR 4211). But that tolling applies only “if not inconsistent with the District of Columbia Home Rule Act.” *Id.* Tolling the Council review period for a proposed budget reduction under section 453 would be inconsistent with the limited review period section 453 of the Home Rule Act establishes.

⁶ Black’s Law Dictionary (3d Pocket ed. 2006) (definition of “independent agency”).

⁷ Approved Oct. 21, 1968 (82 Stat. 1204; D.C. Official Code § 2-501 *et seq.*).

⁸ D.C. Official Code § 2-502(5).

Similarly, the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (“CMPA”)⁹ defines an “independent agency” as a “board or commission of the District of Columbia government not subject to the administrative control of the Mayor.”¹⁰

The 1991 Act’s legislative history bolsters our ordinary-meaning interpretation. Its conference report explains that the addition of section 453 was prompted by the Council’s and Mayor’s desire to “apply austerity measures to . . . all agencies including those labeled independent.”¹¹ Our reading also dovetails with the approach this Office took in a 2008 memorandum.¹² There, we acknowledged that an “all-inclusive definition of the term ‘independent agency’ may be somewhat elusive,” but suggested¹³ that, at the very least, the term could be fairly read to encompass any agency that fit the APA’s definition of an “independent agency.”¹⁴

Under that ordinary-meaning approach, the Sentencing Commission is an independent agency. The Advisory Commission on Sentencing Establishment Act of 1998¹⁵ expressly identifies the Commission as an “independent agency” within the meaning of the CMPA,¹⁶ which also means that it is not subject to the Mayor’s administrative control and is therefore independent under the APA’s definition. Moreover, the Commission’s members are appointed from all three branches of the District government,¹⁷ so they do not answer to any one branch.¹⁸

Two possible objections might be raised, although neither is persuasive.

First, it could be argued that section 453 applies only to independent agencies that are made independent by the Home Rule Act itself (known as “Charter-independent” agencies), especially since the only body that section 453 specifically references as an “independent agency” is the Board of Education, which, at the time, was Charter-independent.¹⁹ But section 453’s language applies to all independent agencies, not just Charter-independent ones. If Congress had wanted to apply section 453 only to Charter-independent agencies, Congress “could have easily done so.” *Babb v. Wilkie*, 206 L. Ed. 2d. 432, 445 (2020); see *Advocate Health Care Network v.*

⁹ Effective Mar. 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-601.01 *et seq.*).

¹⁰ D.C. Official Code § 1-603.01(13).

¹¹ H.R. Rep. No. 102-170 (1991). The version of the committee report currently available to us is not paginated.

¹² Memorandum from Peter J. Nickles, Attorney General, to Will H. Singer, Chief of Budget Dev. and Execution, Nov. 19, 2008 (“2008 Memorandum”). It is also consistent with recent practice – such as a recent Mayor’s Order that imposes a unilateral budget freeze but does not extend that freeze beyond “subordinate executive agencies,” a phrase that has typically been used to exclude agencies that the Council has designated as independent. See Mayor’s Order 2020-57, § X(1), dated Apr. 6, 2020.

¹³ We say “suggested” because the memorandum did not decide the question outright. The discussion of section 453 was merely intended to illustrate the Mayor’s “oversight of District government spending to insure and maintain a balanced budget.” *Id.* at 5.

¹⁴ See *id.*

¹⁵ Effective Oct. 16, 1998 (D.C. Law 12-167; D.C. Official Code § 3-101 *et seq.*).

¹⁶ D.C. Official Code § 3-101(a).

¹⁷ See D.C. Official Code § 3-102(a)(1). This plural appointment structure, like other aspects of the Commission’s independence, is consistent with the purely advisory nature of the Commission’s functions. See *id.* § 3-102(b).

¹⁸ The Commission also exercises independent personnel authority. *Id.* § 3-107(b).

¹⁹ See *id.* § 1-204.53(a) (referencing the Board of Education); 2008 Memorandum at 5 (making this point).

Stapleton, 137 S. Ct. 1652, 1659 (2017) (same). Moreover, this reading would be at odds with the earlier-cited conference report for the 1991 Act. In addition to the report’s broad language – which is not limited to Charter-independent agencies – the report references testimony from Council Chairman Wilson identifying seventeen (17) different agencies as independent,²⁰ a number greater than the number of Charter-independent agencies then or now.

Second, it could be argued that the District of Columbia Public Emergency Act of 1980²¹ authorizes the Mayor to unilaterally reduce the Commission’s budget. It does not. It is true that the Act permits the Mayor to “[e]xercise operational direction over all District of Columbia government departments and agencies during the period when an emergency executive order may be in effect.”²² But this language need not be read, and therefore must not be read, to allow the Mayor to sidestep the Council’s prerogative under section 453 of the Home Rule Act to approve any proposed cut to an independent agency’s current budget.

If you have any questions, please contact Josh Turner at 442-9834, or me at 724-5524.

BKF/jat

²⁰ H.R. Rep. No. 102-170 (1991).

²¹ Effective March 5, 1981 (D.C. Law 3-149; D.C. Official Code § 7-2301 *et seq.*).

²² D.C. Official Code § 7-2304(b)(10).