GAO

United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-279095.2

June 16, 1998

The Honorable Charles H. Taylor
Chairman, Subcommittee on
District of Columbia
Committee on Appropriations
House of Representatives

Dear Mr. Chairman:

This responds to your letter dated April 7, 1998, asking whether the District of Columbia Financial Responsibility and Management Assistance Authority (the Authority) has complied with the limitation provided in section 102 of the District of Columbia Financial Responsibility and Management Assistance Act of 1995 (the Act), Pub. L. No. 104-8, 109 Stat. 97 (1995), in paying the Authority's staff. You asked that we consider all Authority staff who received pay for any period from the Authority's inception through March 31, 1998.

We requested information from the Authority concerning its staff compensation, held several meetings with Authority staff, and reviewed personnel and pay records of a number of Authority employees. As explained in detail in the attachments to this letter, we conclude that for some or all of the period in question, the Authority has paid four of its staff members at rates exceeding the pay limitation established by section 102.

Section 101(a) of the Act establishes the Authority as an entity within the government of the District of Columbia, and not as a department, agency, establishment, or instrumentality of the United States government. The Authority consists of five members appointed by the President who serve without pay, one of whom the President designates to serve as Chair. Sections 102(b) and (d) of the Act. The Act provides that the Authority shall adopt by-laws, rules, and procedures governing its activities, including procedures for hiring experts and consultants. Section 102(e).

The Act provides that the Chair with the consent of the Authority shall appoint an Executive Director, who "shall be paid at a rate determined by the Authority, except

that such rate may not exceed the rate of basic pay payable for level IV of the Executive Schedule." Section 102(a) (emphasis added). The Act also provides that, with the approval of the Chair, the Executive Director may appoint and fix the pay of additional personnel, "except that no individual appointed by the Executive Director may be paid at a rate greater than the rate of pay for the Executive Director." Section 102(b)(emphasis added).

Section 102 in subsection (c) provides wide latitude to the Authority in appointing and fixing the pay of the Executive Director and staff. However, section 102 in subsections (a) and (b) also clearly establishes the maximum rate at which the Executive Director and the staff may be paid, i.e., the rate of basic pay for level IV of the Executive Schedule.

The Executive Schedule pay rates to which section 102 of the Act refers are established pursuant to 5 U.S.C. chapter 53, subchapter II, for certain senior federal officers and employees. Under this authority, the annual rates of basic pay payable for level IV during the period in question were $115,700 from January 1995 to January 3, 1998 and $118,400 from January 4, 1998 to the present.

In February 1997, the Authority increased the salaries of the Executive Director and the General Counsel to $122,700 and $121,900, respectively. As a result of the increases, the Executive Director and the General Counsel received (and continued to receive through the period covered by your request) a rate of pay exceeding the rate of basic pay for Executive Level IV. The Authority characterized the increases as "locality pay" adjustments. In addition, in February 1997, the Authority made lump-sum payments to the Executive Director and the General Counsel in the amounts of $12,500 and $12,000, respectively. The Authority characterized these payments as retroactive locality pay for the prior 18 months, that is, from the inception of their employment with the Authority in July 1995 through January 1997. Also, in March 1998, the Authority employed an Interim Deputy Management Officer under a temporary appointment for a period of approximately 6 months at a rate that equates on an annual basis to $120,000, which exceeds the level IV rate of $118,400.

As we explain in detail in Attachment I, there is no basis for the Authority to pay regular salary payments to any of its staff at rates exceeding Executive Level IV. Characterizing the excess payments as locality pay does not provide a legal basis for exceeding the level IV limitation established by section 102 of the Act. Also, there was no basis for the Authority to provide the Executive Director and General Counsel with the retroactive payments.

In addition to the three employees discussed above, in January 1998, the Chair of the Authority appointed an individual to the position of Chief Management Officer to assist in carrying out additional duties placed on the Authority by the District of

Columbia Management Reform Act of 1997. The Authority's agreement with the Chief Management Officer provides for an annual salary of $155,000, plus other payments. The Authority asserts that the section 102 pay limitation does not apply to the Chief Management Officer because the Executive Director did not appoint the Chief Management Officer. The Authority told us that it inferred from the Management Reform Act of 1997, and the circumstances surrounding its enactment and implementation, the authority to pay the Chief Management Office at a rate greater than level IV. As we explain in detail in Attachment II, we do not find these arguments persuasive and conclude that there is no statutory basis for the Authority to pay the Chief Management Officer in excess of the pay limitation provided in section 102 of the Act.

We trust that this responds to your request.

Sincerely yours,

Robert P. Murphy
General Counsel

Attachments - 2

PAY OF THE EXECUTIVE DIRECTOR, THE GENERAL COUNSEL, AND THE INTERIM DEPUTY MANAGEMENT OFFICER

The Authority provided us listings of their employees and their annual "salary" rates for fiscal years 1995-1998.[1] The listings show that in fiscal year 1995, when Congress established the Authority, the Authority set the Executive Director's salary at $115,700, the basic rate of pay then applicable to Executive Level IV,[2] with the next highest salary being that of the General Counsel, $115,000. Effective in February 1997, the Authority raised the Executive Director's salary to $122,700 and the General Counsel's salary to $121,900. As a result, the rates for these two individuals exceeded the Executive Level IV rate then in effect of $115,700. The Authority continued to pay the Executive Director and the General Counsel at the rates of $122,700 and $121,900, respectively, through March 31, 1998. These rates also exceed the $118,400 Executive Level IV rate that became effective in January 1998.[3] In addition, the Authority made lump-sum payments in February 1997 to the Executive Director and the General Counsel in the gross amounts of $12,500 and $12,000, respectively.

The Authority asserts that the salary increases were based on granting these individuals so-called locality pay. Similarly, the Authority characterized the lump sum payments as retroactive locality pay for the prior 18 months, i.e., retroactive to the inception of the two individuals' employment with the Authority in July 1995.

In addition, in March 1998, the Authority employed an Interim Deputy Management Officer under a temporary employment agreement for a term of approximately 6 months at a salary of $58,500. The Authority indicates that the $58,500 salary equates on an annual basis to a rate of $120,000. Thus, the Interim Deputy

---

[1]The Authority identified several individuals as consultants to the Authority under contracts with consulting firms. The Authority has the authority to hire experts and consultants, and to enter into contracts to carry out its responsibilities. The Act, §§ 101(e)(1) and 103(g); and the District of Columbia Management Reform Act of 1997, Pub. L. No. 105-33, Title XI, Subtitle B, § 11103(a), 111 Stat. 251, 731 (1997). As consultants, they are not subject to the limitation on pay of Authority staff provided by section 102. See e.g., B-231565, Nov. 14, 1988, and cf. B-237117, July 12, 1991. Thus, they fall outside the scope of your request.

[2]See Executive Orders No. 12944, Dec. 28, 1994, 60 Fed. Reg. 309; No. 12984, Dec. 28, 1995, 61 Fed. Reg. 237; and No. 13033, Dec. 27, 1996, 61 Fed. Reg. 68987.

[3]See Executive Order No. 13071, Dec. 29, 1997, 62 Fed. Reg. 68521.

Management Officer also is being paid at a rate that exceeds the current Executive Level IV rate of $118,400. The Authority has told us that its justification for this rate is that it also includes some amount for locality pay. The Authority's pay and personnel records, however, do not refer to locality pay for this employee.

In its response to our inquiry, the Authority relied on an August 1996 opinion of the Authority's General Counsel to the Executive Director to justify paying salaries in excess of Executive Level IV.[4] The General Counsel's opinion does not focus on locality pay, but rather on the scope of the limitation provided by section 102 of the Act. The General Counsel states that section 102 adopts terminology from provisions of Title 5 of the U.S. Code applicable to federal civil service employees, such as "rate of basic pay, which are terms of art and refer to base rates, not total compensation." He indicates that the federal pay statutes authorize the head of a federal agency to pay a cash award to an employee based on certain criteria, and that such an award is considered to be in addition to the regular pay of the recipient (5 U.S.C. §§ 4502, 4503, 4505). With respect to locality pay, he states only that there are specific provisions applicable to the federal civil service for payment of locality-based comparability pay under 5 U.S.C. § 5304, and other types of hardship allowances, which are not limited by the rate of basic pay, but rather are adjustments to it. While he recognizes that these provisions do not apply to the Authority, he indicates that they are indicative of the fact that there are several ways to compensate employees over and above their rate of basic pay. Thus, in his view, since Congress used concepts drawn from title 5, U.S. Code, it did not intend to exclude these alternative methods of compensation for Authority employees.[5]

Authority staff advised us that in 1995 and 1996, the Authority had included locality pay in setting Authority staff salaries, but not necessarily in the same percentages

---

[4]After receiving the 1996 opinion and meeting with Authority staff, we invited the staff to supplement its explanation of its legal authority. We have not received any additional explanation or analysis.

[5]The Authority provided information showing that in fiscal year 1996, in addition to their salaries, 12 employees were paid bonuses, ranging in amount from $500 to $4,000. The information indicates that none of these employees received a salary at a rate in excess of the Executive Level IV rate then in effect ($115,700), with the employee who received the largest bonus ($4,000) also receiving the highest salary rate ($110,000) of the 12. Payment of these bonuses apparently also was based on the General Counsel's August 1996 opinion. Although the federal statutes he analogizes to do not apply to the Authority, an entity in the D.C. government, there is authority to make performance-based awards to D.C. employees in amounts not exceeding $5,000. D.C. Code Title 1, § 1-620.1.

applicable to federal employees. They also advised us that in later years the Authority has not granted locality pay increases to its employees due to cuts in the Authority's budget. They noted that the Authority has the discretion under the Act to set employees' pay rates without regard to federal civil service laws and rules, and that, therefore, the Authority had the discretion to determine whether and in what amounts to give employee pay increases. They also advised us that they do not consider the Authority subject to the limitation in 5 U.S.C. § 5304(g) that generally limits basic pay plus locality pay for federal employees to no more than the rate for Executive Level IV. To support this position, they furnished us a January 1998 opinion from outside counsel.

We agree with the Authority's contention that it has broad discretion to set the pay rates of its employees. Section 102(c) of the Act provides that the Executive Director and staff of the Authority may be appointed without regard to the provisions of title 5, U.S. Code, governing appointments in the competitive service, and paid without regard to the provisions of Chapter 51 and Subchapter III of Chapter 53 of title 5 relating to classification and General Schedule pay rates, and appointed and paid without regard to the provisions of the District of Columbia Code governing appointments and salaries. We believe, however, that the Authority's pay-setting discretion is limited by subsections (a) and (b) of section 102 of the Act, prescribing the maximum rate payable to Authority staff. For those employees earning less than Executive Schedule Level IV, the Authority's characterization of an employee's salary as including locality pay has no legal or practical consequences. We find no basis for the Authority to use the concept of locality pay to exceed the section 102 limitation.

The plain language of the section 102 limitation does not support the General Counsel's view that the limitation applies only to basic pay. Section 102 states that the Executive Director "shall be paid at a rate determined by the Authority, except that such rate may not exceed the rate of basic pay payable for level IV," and no individual appointed by the Executive Director "may be paid at a rate greater than the rate of pay for the Executive Director." (Emphasis added.) The provision does not limit only the Executive Director's and staff's rates of "basic pay," as the General Counsel reads the statute. Rather, the limitation is on the Executive Director's "rate of pay." Section 102 uses the term "basic pay" only to describe the level IV limit it sets.[6] Since the level IV basic pay rate in effect during the period in question here was initially $115,700, raised to $118,400 effective January 1998, the

---

[6]The Executive Level IV rate is set pursuant to 5 U.S.C. chapter 53, subchapter II, which establishes the Executive Schedule pay rate system. Adjustments to Executive Schedule rates are authorized by 5 U.S.C. § 5318, but this provision does not incorporate the locality-based increases authorized under the separate provisions of 5 U.S.C. chapter 53, subchapter I, into the Executive Schedule rates.

Authority has paid these three employees "at a rate greater than" the rate of basic pay for level IV.

The General Counsel seeks to justify increasing these employees' pay above Executive Level IV by reference to the federal locality pay system and treating locality pay as a separate payment independent of basic pay. In so doing, the General Counsel overlooks the close connection between basic pay and locality pay.

The locality pay system applicable to federal employees covered by the General Schedule pay system (5 U.S.C. Chapter 53, Subchapter III) and certain other federal employees is established by statute as part of the pay comparability system. One of the principles underlying this system is that "Federal pay rates [should] be comparable with non-Federal pay rates for the same levels of work within the same local pay area," and "any existing pay disparities between Federal and non-Federal employees should be completely eliminated." 5 U.S.C. § 5301. To achieve these goals, 5 U.S.C. § 5303 provides for annual nationwide adjustments to statutory pay schedules, and 5 U.S.C. §§ 5304 and 5304a (and implementing regulations found in 5 C.F.R. Part 531, Subpart F) provide for locality based comparability payments. The specific purpose of the locality payments is to reduce disparities between the government's nation-wide pay rates and nonfederal pay identified in specific localities. The amount of the comparability payment determined to be payable within any particular locality during a calendar year is computed based on statutory criteria, is stated as a single percentage uniformly applicable to covered positions within the locality, and is computed by applying that percentage to covered employees' scheduled rates of basic pay. 5 U.S.C. § 5304(c)(1). Such a payment is considered to be part of basic pay for purposes of retirement, life insurance, premium pay, overtime pay, compensatory time off, standby duty pay, severance pay and advances of pay; and such pay is to be paid in the same manner and at the same time as basic pay. 5 U.S.C. § 5304(c)(2), and 5 C.F.R. § 531.606(b). Except for certain prescribed positions, such locality-based comparability payments may not be paid at a rate which, when added to the employee's rate of basic pay, "would cause the total to exceed the rate of basic pay payable for level IV of the Executive Schedule." 5 U.S.C. § 5304(g)(1).

Implicit in the General Counsel's opinion is that Congress intended the Authority to adopt a pay system under section 102 comparable to that provided for high level officials in the executive branch, such as members of the Senior Executive Service (SES). We recognize that under the federal pay system, SES and certain other executives whose basic pay may not exceed level IV of the Executive schedule receive locality pay. 5 U.S.C. § 5304(g). However, this is specifically provided for by statute, and this statute specifically caps these individuals' combined basic pay and locality pay at executive schedule level III. 5 U.S.C. § 5304(g)(2), (h). In addition, under 5 U.S.C. § 5304(h)(1)(iii), positions under the Executive Schedule (5 U.S.C. Chapter 53, Subchapter II) are not covered by this locality pay entitlement,

although 5 U.S.C. § 5304(h)(2) authorizes the President to make exceptions. Not only is there no basis for the implications raised by the General Counsel's opinion in the text or the legislative history of the Act, but, as explained below, the concept of locality pay does not have meaning in view of the Authority's statutory pay scheme and, in fact, the Authority did not include a locality pay component in its pay system in any systemic fashion.

Unlike the federal pay system, all of the Authority's employees are in a single locality, Washington, D.C. Also unlike the federal system, the Authority has broad discretion to set employees' pay rates without regard to the structured pay schedules applicable to federal agencies. Since the Authority may set pay rates at a level it believes to be appropriate in its locality--and not at a fixed nationwide level--there would never be a reason to adjust pay rates to recognize rates in a local area. Perhaps for this reason the Authority has not been consistent in its use of the concept of locality pay. Our review of a number of employees' pay and personnel records indicated that in setting some employees' salary rates the Authority characterized some amounts as locality pay, but this separate amount was subsequently removed from employee pay records and only the total salary was shown. For other employees no indication appeared in the pay or personnel records that the Authority included locality pay in the pay rate. Also, the information we reviewed did not show any regular increases based on locality pay comparable to the regular increases that occurred under the federal system during the same period, nor does the Authority's written "Personnel Policies and Procedures" refer to locality pay. We conclude that the Authority did not institute a locality pay system in which receipt of such pay becomes an entitlement once the amount payable is determined for a particular locality under the statutory guidelines. Instead, the Authority considered locality pay a discretionary item to include or not include as it chose in setting an employee's salary.

In any event, the fact that employees did not receive locality pay in some years and some employees did not receive it in any year casts doubt on whether the Authority actually had a locality pay system in place. Instead, the Authority used locality pay as a separate increment of salary as a basis for increasing the Executive Director's and General Counsel's pay, and then later for establishing the salary of the Interim Deputy Management Officer, beyond the level IV limits.[7]

The General Counsel's view, and the Authority's implementation of it, has the logical effect of emasculating the section 102 limitation. The Executive Schedule is not adjusted for locality pay and the basic rate of pay of the Executive Levels increases only in accordance with specific authority in title 5, United States Code.

---

[7]Compare 68 Comp. Gen. 363 (1989); and B-205284, Nov. 16, 1981, concerning compensation of Tennessee Valley Authority executives.

Yet, by making retroactive payments, the Authority in effect increased the Executive Level IV limitation of $115,700 as soon as it became effective on the Authority in 1995. Because, under the Authority's argument, there is no constraint on the amount the Authority denominates as locality pay, the Authority, in effect, could exceed the section 102 limitation to an extent that makes the limitation meaningless. Nothing in the law or its legislative history indicates that Congress intended for the Authority to be so unrestrained in paying salaries to its officers and employees.

In conclusion, we believe the Authority violated the section 102 limitation when it increased the salaries of the Executive Director and General Counsel beyond the level IV rate, made the retroactive payments in February 1997 to, in effect, increase their pay retroactively for their first 18 months on the job[8], and set the Interim Deputy Management Officer's salary at a rate that exceeds level IV.

[8]Although the Authority designated these payments as retroactive pay for pay periods in fiscal years 1995, 1996 and 1997, they were made in a lump sum apparently entirely from funds appropriated to the Authority for fiscal year 1997.

PAY OF CHIEF MANAGEMENT OFFICER

The Authority advised us that its Chair, with the approval of the Authority, appointed an individual to the position of Chief Management Officer in January 1998. The Authority specially created the position to assist it in carrying out the additional responsibilities enacted by the District of Columbia Management Reform Act of 1997, Pub. L. No. 105-33, Title XI, Subtitle B, 111 Stat. 251, 730. The Authority's agreement with the Chief Management Officer provides for a five year term with an annual salary of $155,000, eligibility for a bonus after one year in an unspecified amount, payment of $25,000 over a mutually agreed period to reflect retirement benefits she forgoes by leaving her previous employment, and the sum of $12,000 to cover "transitional expenses," including moving and transitional housing in Washington, D.C.. In addition the Authority agreed to contract with the ICMA Retirement Corporation to provide her a "defined contribution of $25,000 per year or ten percent of total compensation, whichever is less, and deferred compensation of up to $8,000 per year."

The Authority staff advised us that they believe the Management Reform Act of 1997 provides authority for the establishment of this position. They base this opinion on the fact that the Management Reform Act places additional responsibilities on the Authority Chair or his "designee" which they state means that the Authority may create the position in question and appoint an individual to serve in the position. They assert that Congress understood that the new statutory responsibilities would require the appointment of a Chief Management Officer and it would be necessary to pay the market rate to obtain a person with the requisite skills and experience to fill the position. They also indicate that because the Authority, not the Executive Director, appointed the incumbent, and because she reports to the Authority, not the Executive Director, she is not a staff person subject to the limitation on pay in section 102 of the Act since the limitation applies only to personnel appointed by the Executive Director.

The provisions of the Management Reform Act of 1997 to which the Authority staff refer as authority for the Chief Management Officer's position are found in section 11104. This section establishes management reform teams to implement management reform plans for the District of Columbia. Section 11104(a) provides that these teams shall consist of (1) the Authority Chair "(or the Chair's designee)," (2) the District of Columbia Council Chair "(or the Chair's designee)", (3) the Mayor "(or the Mayor's designee)," and (4) with respect to plans involving a specific department, the head of the department involved. While section 11103(a) specifically requires the Authority to enter into contracts with consultants to develop the management reform plans required by section 11104, the Management Reform Act contains no provision creating a new position to be filled by the Chair's

"designee," nor waiving the pay limitations provided by section 102 of the 1995 Act.

In our view, the common understanding to be afforded to the Management Reform Act's reference to "designee" is that the Authority Chair may be represented on the management reform teams by someone of his choosing rather than performing the related duties personally. The use of a "designee" is a common device that gives a high level official the flexibility to perform certain duties through a subordinate rather than performing the duties personally to the detriment of other required duties and responsibilities. In this regard, the Act provides the authority to have a "designee" on the management reform teams not just to the Authority Chair, but to other high ranking officials of the District - the Mayor and the Council Chair. We do not agree that by providing that the explicit authorization of the Authority Chair to participate in the management reform teams through a "designee" authorizes the Authority Chair to establish a position for his designee that pays a salary exceeding the specific pay limitation applicable to the Authority under section 102. Finally, we found no reference in the legislative history of the Management Reform Act, nor has the Authority referred us to such, indicating that Congress created (or authorized the creation of) a new position free from the level IV pay limitations applicable to Authority staff members.

The Authority reasons that it avoids the pay limitation by creating a position filled directly by, and reporting to, the Authority, rather than appointed by the Executive Director with the approval of the Chair. The implication of this view is that the Authority may create positions, directly appoint the staff to fill the positions, and pay them without regard to any limitation, in effect rendering the section 102 pay limitation meaningless. Obviously, this would be contrary to Congress's purpose in enacting section 102. In our view the reference in the 1997 statute to a designee to whom the Chair may delegate certain functions or duties is not sufficient to overcome the specific pay limitation in the original statute establishing the Authority and providing for the appointment and pay of an Executive Director and additional staff.[9]

Since the Authority's budget currently is under review, the appropriations process for fiscal year 1999 provides an opportunity for Congress to consider whether the appointment of a Chief Management Officer with pay and benefits in excess of the limitation provided in section 102 of the Act is desirable, and if so, to enact additional legislation to specifically so provide. However, in the absence of such

---

[9]To adopt the Authority's position in this regard would, in effect, require construing the provisions of the Management Reform Act to impliedly amend the section 102 pay limitation provision. Amendments of statutory provisions by implication are not favored and will not be upheld in doubtful cases. See Sutherland, Statutory Construction, Vol. 1A, § 22.13, (5th ed. 1991).

legislation, the pay arrangements the Authority made with the Chief Management Officer are contrary to section 102 of the Act.[10] 5 U.S.C. § 5304(h)(2)

[10]In addition to the Chief Management Officer's $155,000 salary exceeding the section 102 limitation, certain of the other benefits the Authority agreed to provide her such as the $25,000 payment to reflect lost retirement benefits from her prior employment, the contract with ICMA Retirement Corporation for a contribution of $25,000 or ten percent of total compensation, and deferred compensation of up to $8,000 per year may be viewed as pay supplements in violation of section 102. See Supplemental Retirement Benefits of President of Radio Free Europe/Radio Liberty, Inc., 72 Comp. Gen. 321 (1993).

DIGESTS

1. There is no legal basis for the D.C. Financial Responsibility and Management Assistance Authority (Authority) to have made regular salary payments to its staff at rates exceeding the rate of basic pay for Executive Level IV. Section 102 of Public Law 104-8 establishes the rate of basic pay for level IV as the maximum rate of pay for the Authority's staff. Neither section 102 nor its legislative history supports the Authority's view that it may exceed the level IV rate limitation by characterizing the excees pay to three of its staff as locality pay. Further, while the Authority analogizes to locality pay in the federal system, the concept of locality pay does not have meaning in view of the Authority's pay scheme and the Authority did not include a locality pay component in its pay system in any systemic fashion.

2. There is no legal basis for the D.C. Financial Responsibility and Management Assistance Authority (Authority) to have made regular salary payments to its staff at rates exceeding the rate of basic pay for Executive Level IV. Section 102 of Public Law 104-8 establishes the rate of basic pay for level IV as the maximum rate of pay for the Authority's staff. Neither the D.C. Management Reform Act of 1997, nor its legislative history, supports the Authority's view that it may infer from the Act,or the circumstances surrounding its enactment and implementation, the legal authority to pay a Chief Management Officer in excess of Executive Level IV. Further, the Authority's view that the level IV limitation does not apply to a Chief Management Officer appointed by the Authority Chair, rather than by the the Authority's Executive Director, would render the pay limitation meaningless contrary to the Congress' purpose in enacting section 102.