COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-221187 December 11, 1985

The Honorable Charles McC. Mathias, Jr.
Chairman, Subcommittee on Governmental
Efficiency and the District of Columbia
Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

Your letter of November 21, 1985, requests our opinion on how many terms and years in office the original members of the District of Columbia Retirement Board are legally eligible to serve. We conclude that the original Board members are limited to one 4-year term beyond their initial terms. Therefore, an original member selected for an initial 1-year term can serve no more than a total of 5 years on the Board.

BACKGROUND

The Board was created by section 121 of the District of Columbia Retirement Reform Act of 1979, Pub. L. No. 96-122 (November 17, 1979), 93 Stat. 866, 869, codified at D.C. Code § 1-711 (1981). It consists of 11 members, to be elected or appointed by specified sources. See § 121(b)(1). Generally each Board member serves a 4-year term; however, the original members of the Board were assigned staggered terms ranging from 1 to 4 years, as determined by lot. Section 121(b)(3) provides in this regard:

> "(A) Except as provided in subparagraph (B), the members of the Board shall each serve a term of four years, except that a member selected to fill a vacancy occurring prior to the end of the term for which his predecessor was selected shall only serve until the end of such term. A member may serve after the expiration of his term until his successor has taken office.

"(B) Of the members of the Board who are first selected--

"(i) two shall serve for a term of one year,

"(ii) three shall serve for a term of two years,

"(iii) three shall serve for a term of three years, and

"(iv) three shall serve for a term of four years, as determined by lot at the first meeting of the Board."

Section 121(b)(4) limits the terms of individual Board members as follows:

"No individual shall serve more than two terms as a member of the Board, except that an individual serving less than two years of a term to which some other individual was originally selected shall be eligible for two full terms as a member of the Board and an individual serving two years or more of a term to which some other individual was originally selected shall be eligible for only one full term as a member of the Board."

A literal application of the above statutory provisions yields several different results. Generally an individual may serve two terms of 4 years each, for a total of 8 years on the Board. However, eight of the original Board members were selected for initial terms of less than 4 years pursuant to § 121(b)(3)(B). Their two terms (the initial term plus one 4-year term) would permit total service ranging from 5 to 7 years. Finally, under § 121(b)(4) individuals who first joined the Board as replacements for other members are eligible to serve for a total period of from 6 years to just under 10 years, depending on the length of their interim service.

Apparently the two original Board members who received initial 1-year terms were then selected for a full 4-year term. The specific question presented is whether these individuals are now eligible for a second 4-year term.

Enclosed with your letter are two conflicting legal opinions on this question prepared by outside counsel to the Board. One opinion--by Long, Peterson & Horton--questions on policy grounds the "disparate treatment of original Board members, Board members elected subsequently, and replacement Board members," but concludes that these disparities are compelled by the statutory language. Therefore, it holds that original Board members may serve no more than one 4-year term beyond their initial terms. The other opinion--by Hogan & Hartson--acknowledges a "strong argument" that the "bare statutory language" requires this result. However, it finds sufficient ambiguity in the language and evidence of a contrary congressional intent to conclude "it [is] more likely than not that a court would sustain the view that the Board members originally selected for a one-year term should be eligible for a second four-year term."

ANALYSIS

The argument that a literal interpretation of the statute restricts original Board members to one additional term of 4 years is clear enough and needs no elaboration here. The issue is whether an adequate basis exists to eschew this literal interpretation, as the Hogan & Hartson opinion suggests. For the reasons stated below, we believe that a departure from the plain language of the statute cannot be justified.

The Hogan & Hartson opinion notes that the statute explicitly provides a method for determining a replacement Board member's eligibility for additional terms (based on his or her length of service in the unexpired term), but asserts that the statute "is silent" regarding the proper method of computing an original Board member's eligibility for additional terms. The opinion views this as an "ambiguity" in the statutory language that justifies resort to the legislative history.

Turning to the legislative history, the opinion points out that the provisions regarding the terms of Board members represent a compromise between the legislation as first introduced, which would have limited all members to one term, and a committee amendment, which would have removed any limits on a member's years of service. The opinion then goes on to conclude:

> "* * * Section 121(b)(4)'s provision for service on the Board in some cases for up to

> 10 years indicates Congress' judgment that in no event should anyone serve for 10 years or more on the Board. At the same time, Congress decided that not only would a one-term (or four-year) limitation inhibit the development of necessary expertise, but also that a member who serves for less than six years should be permitted to run again for membership on the Board. That is, Congress has apparently decided that its concerns regarding perpetual membership on the Board are not present where the potential candidate for reappointment or reelection has served for less than six years.
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> "In the context of Congress' stated policy objectives regarding Section 121(b)(4), arguably there is no logical reason for distinguishing between individuals who have served for less than six years because they were appointed to an unexpired term and individuals who have served for less than six years because they were original appointees to the Board who were assigned, by lot, to shortened terms. Accordingly, a solid argument can be made that Congress' intent with respect to the two-term limit on Board service can be best effectuated by permitting all members whose original term on the Board is for less than two years to run for two additional four-year terms. This would treat all members equally, while at the same time fully complying with the policy objectives that prompted Congress to enact Section 121(b)(4) in the first place."

We cannot agree with the above analysis for several reasons. First, we find no ambiguity in the statutory provisions governing the terms of original Board members. As discussed previously, § 121(b)(3)(A) provides generally that Board members serve 4-year terms but makes an exception for the original members, who serve the initial terms specified in § 121(b)(3)(B). The next provision, § 121(b)(4), states generally that no individual shall serve more than two terms and does not include original Board members within the specified exceptions to this limitation.

The ambiguity that the Hogan & Hartson opinion points to is the absence from the statute of exceptions to the two-term limit for original Board members such as those provided for replacement members. While the statute might have treated original members in a manner comparable to replacement members, its mere failure to do so does not make the statute ambiguous. Likewise, we cannot accept the assertion in the Hogan & Hartson opinion that due to the absence of comparable exceptions, the statute is silent regarding application of the two-term limit to original members. In our view, § 121(b)(4) is not silent or ambiguous on this point; it does apply the two-term limit to original Board members since they clearly come within the scope of this limit and are not covered by the stated exceptions to it. Thus, the statute appears on its face to deal clearly and fully with the terms of original Board members.

Second, even looking beyond the literal terms of the statute, we find no evidence that Congress meant anything other than what it said in limiting original Board members to one additional 4-year term. As the Hogan & Hartson opinion concedes, the legislative history contains no specific indication of intent to the contrary. Rather, the opinion's central argument on congressional intent seems to be that, in view of the exceptions in § 121(b)(4) regarding replacement Board members, "Congress has apparently decided that its concerns regarding perpetual membership on the Board are not present where the potential candidate for reappointment or reelection has served for less than six years." Allowing Board members whose original terms were less than 2 years to run for two additional terms would be consistent with this intent and would "treat all members equally * * *."

As discussed previously, the statute expressly provides a range of disparities in the terms and years of service available to Board members both within and between different categories, i.e., original members, replacement members, and all other members. Thus, it is clear that Congress could not have intended to treat all members equally with regard to their tenure. Moreover, the approach taken in the Hogan & Hartson opinion does not remove the disparities, but simply rearranges them.

Application of the literal language of the statute to the two original members with 1-year terms limits them to a total of 5 years' service, which is less than the total service

potentially available to all other Board members. However, the Hogan & Hartson approach would enlarge the total potential service for these two members to 9 years, which is greater than the total service available to almost all other members. In fact, it would allow the two original members selected for 1-year terms to end up with longer total service than any of the other original members, who drew longer initial 2-, 3-, and 4-year terms by lot. We see no basis in the legislative history to suggest that this approach is preferable to the literal interpretation in terms of effectuating congressional intent.

In sum, it is our opinion that the plain language of the statute governs the terms of the original Board members. While Congress could have structured the term of service provisions in many different ways, the approach reflected in the statutory language seems clear, workable and in no way inconsistent with congressional intent.

Sincerely yours,

Milton J. Socolar

for Comptroller General
of the United States