No. 112488

IN THE
SUPREME COURT OF ILLINOIS

JOSEPH M. FERGUSON, in his official capacity as Inspector General of the City of Chicago,

Plaintiff-Appellee,

v.

STEPHEN R. PATTON, in his official capacity as Corporation Counsel of the City of Chicago,

Defendant-Appellant.

On Appeal from the Appellate Court of Illinois
First Judicial District, No. 10-1152
There Heard on Appeal from the Circuit Court of Cook County, Illinois
County Department, Chancery Division, No. 09 CH 43287

REPLY BRIEF OF DEFENDANT-APPELLANT

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

ARGUMENT

This suit has no basis in law. Indeed, it is unprecedented -- there is not a single reported case anywhere in the country in which a court has entertained litigation by a municipal inspector general against the municipal corporation of which he is a mere part. And the Inspector General wholly fails to meet our submission that the dispute is non-justiciable and that he lacks capacity to sue. He conflates political independence with separate legal existence, ignores the corporate structure in which he operates, and enlarges the powers City Council gave him. The dismissal should be reinstated.

Those barriers foreclose the Inspector General's bid for cross-relief, which is fanciful in any event. The attorney-client privilege fully applies to communications between government clients and counsel, as this court has held. It serves critical public interests because it underlies the functioning of government -- where legal issues arise every day -- by encouraging public officials to consult counsel in connection with their work and enabling counsel to give fully informed advice. Cross-relief should be denied.

I. THIS INTRAMUNICIPAL DISPUTE IS NOT JUSTICIABLE.

Because courts may not entertain disputes between members of the same legal entity, see Tanner v. Solomon, 58 Ill. App. 2d 134, 138 (1965); see also City of Chicago v. Beythel Outcast Church, 375 Ill. App. 3d 317, 320 (2007), the Inspector General's complaint is nonjusticiable. See Brief and Appendix of Defendant-Appellant 9-14 [hereafter "CC Br."]. As we explain, a

municipality is a corporation, see, e.g., Johnston v. City of Chicago, 258 Ill. 494, 499 (1913) -- a "single legal entity independent of its officers," Darby v. Pasadena Police Department, 939 F.2d 311, 313 (5th Cir. 1991). For an office or department of the municipality to have separate legal existence, it must become a corporation in its own right. See 3 Eugene McQuillin, The Law of Municipal Corporations, § 12.40 (3d Ed. 1999); CC Br. 12-13. The Inspector General and the Corporation Counsel are parts of a single municipal corporation, so a dispute between them is internal to the corporation and may not be adjudicated in court. See CC Br. 9-20.

The Inspector General gives these principles short shrift and does not cite a single case authorizing a lawsuit between municipal departments or appointed officials in one municipal corporation. Nor are we aware of any. Instead, he cites cases about other governmental disputes and insists his case is justiciable, too, making sweeping generalizations that Illinois courts "often" entertain disputes between government agencies or officials, and that "frequently" justiciability is uncontested. See Brief of Plaintiff-Appellee 10 & n.7 ["IG Br."]; see also id. at 32. That superficial approach is unavailing. Cases that do not consider justiciability are not authoritative on that issue. Beyond that, the cases the Inspector General cites involved governments other than municipal corporations, or involved elected officials. Although the Inspector General claims not to perceive the relevance of these distinctions, see id. at 32, they are critical, see CC Br. 18-19. The rules that preclude suits

between parts of a single municipal corporation absent separate corporate existence apply to municipal corporations but do not apply to governments that are not municipal corporations. And while appointed municipal officials have a superior charged with resolving their disputes with other appointed municipal officials, elected officials do not.

For these reasons, the eleven cases the Inspector General cites, IG Br. 10 n.7, are completely inapposite. Eight of them involve counties, a township, and the federal government, none of which are municipal corporations. Counties are only quasi-municipal corporations; as such, they are organized to exercise some state functions and not exclusively for the local citizenry's benefit, unlike municipal corporations. 1 McQuillin, supra, §§ 2.46, 2.46.10; see also, e.g., Edward J. Berwind, Inc. v. Chicago Park District, 393 Ill. 317, 335 (1946); CC Br. 18. Townships are "created almost exclusively with a view to the policy of the state at large for purposes of political organization, and as an agency of the state and county" -- also unlike municipal corporations, which are "given corporate existence at the request or by the consent of the inhabitants thereof, for the interest, advantage, or convenience of the locality and its people . . . ." Committee of Local Improvements v. Objectors to the Assessment, 39 Ill. 2d 255, 259 (1968). In fact, there are different statutory schemes for townships and municipal corporations. See 60 ILCS 1/1-1 et seq. (2010) (Township Code); ILCS 65 ILCS 5/1-1-1 et seq. (2010) (Municipal Code). One of the township cases,

Wayne Township Board of Auditors v. Ludwig, 154 Ill. App. 3d 899 (1987), moreover, was against the clerk -- an elected official, see Ill. Rev. Stat. 1986, ch. 139 ¶ 60; see also 60 ILCS 1/50-5(c). And, the federal government is plainly not set up as a municipal corporation, either.

The other three cases the Inspector General cites -- Sampson v. Graves, 304 Ill. App. 3d 961 (1999); Fischer v. Brombolich, 207 Ill. App. 3d 1053 (1991); and Oberman v. Byrne, 112 Ill. App. 3d 155 (1983), involved municipal officials, but they were elected: Sampson by city aldermen against the city's mayor, see 304 Ill. App. 3d at 962-63; Fischer by an elected city commissioner and others against other elected commissioners and the city, see 207 Ill. App. 3d at 1057-58; see also 65 ILCS 5/4-3-1 (2010) (commissioners are elected in commission form of government); and Oberman by an alderman against the mayor and others, see 112 Ill. App. 3d at 157. Both parties here are appointed, not elected. The Inspector General's attempt to distinguish Tanner also fails for this reason. See IG Br. 16-17. In Tanner, the court pointed to cases where "it has been held proper for one agency of government to resort to the courts to resolve a controversy with another governmental agency," 58 Ill. App. 2d at 137, and the Inspector General seizes on this to say his dispute is justiciable because it is "between governmental agencies," too, id. at 17. But the Inspector General ignores that Tanner used the term "agencies" to describe the elected officials who sued in Hubbard v. Board of Trustees of Retirement System, 23 N.W.2d 186

(Mich. 1946) (city mayor), and Chaffin v. County of Christian, 359 S.W.2d 730, 731 (Mo. 1962) (county treasurer). See 58 Ill. App. 2d at 137. This case is between appointed heads of departments in one municipal corporation.

Continuing to skim over the details, the Inspector General declares that the standing of any "government agency" in any "intra-governmental" dispute depends not on "separate corporate status" but on "three other factors" articulated in Department of Registration and Education v. Aman, 53 Ill. 2d 522 (1973). IG Br. 10-12; see also id. at 30-33. Aman is irrelevant. It involved an entirely different situation -- a state agency seeking administrative review of a final administrative decision of the Civil Service Commission, an independent administrative agency specifically charged with reviewing personnel decisions of state agencies. 53 Ill. 2d at 522-23, 525. In this context, the court explained that no constitutional principle "prevents a governmental agency from seeking administrative review of the decision of another agency," and that the "diversity in the statutory provisions creating or conferring power upon administrative agencies" compelled a case-by-case determination that considered pertinent statutory provisions; the agencies' relationship to each other; and the "nature of the controversy out of which the administrative decision arises." Id. at 524-25.

No case has applied Aman outside the administrative review context. Indeed, Aman limited its holding to that context. The court rejected an argument that its holding would invite interdepartmental litigation, stating:

"This record presents a controversy between plaintiff and defendant and a final decision of an independent administrative agency. In that posture, we hold that plaintiff has standing to seek administrative review, and the judgment of the appellate court is affirmed." 53 Ill. 2d at 525. And of course, administrative review is subject to different rules than ordinary civil litigation, including that, by statute, the agency that made the challenged decision must be named as a defendant, see 735 ILCS 5/3-107(a) (2010), primarily to ensure the record of agency proceedings is filed, see Jones v. Cahokia Unit School District No. 187, 363 Ill. App. 3d 939, 941-42 (2006); see also 735 ILCS 5/3-106 (2010). Thus, in an administrative review case, the administrative agency serves the adjudicative function; it does not have an adversarial role. Here, the Inspector General does not seek administrative review, and both sides have an adversarial role.[1] Moreover, Aman has never been applied to a suit like this between municipal department heads. It is not "imprecise," IG Br. 31 n.18, to require distinct legal existence before one part of a municipal corporation can sue another part; it reflects that an action by a municipal department cannot proceed any more than one "against the accounting department of a corporation." Darby, 939 F.2d at 313.[2]

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[1] This point further distinguishes United States v. Interstate Commerce Commission, 337 U.S. 426 (1949), see IG Br. 10 n.7, which was a federal administrative review action, with railroads as the real party in interest against the government.

[2] The Inspector General's suggestion that a municipal corporation is a "unitary body" only where a "claimant seeks to impose liability" on the municipality or a department, IG Br. 31, is nonsense. A government's

The Inspector General's observation that in Des Moines Park Board v. City of Des Moines, 290 N.W. 680, 681 (Iowa 1940) and City Council v. Bowen, 649 So. 2d 611 (La. Ct. App. 1994), see CC Br. 13, the courts relied on the absence of "legislative grant of standing or capacity" rather than lack of separate legal status, IG Br. 31 n.18, does not help him. Both cases were dismissed because the plaintiff was not legally distinct. To be sure, the courts determined this by looking at relevant legislation, see Des Moines Park Board, 290 N.W. at 681 (under legislation creating it, city park board lacked "characteristics of a distinct or corporate organization"); Bowen, 649 So. 2d at 616 (charter made city council just a "branch or part of the greater corporate body politic or juridical entity" of city government), but we have never claimed the IGO ordinance is irrelevant to determining if he has separate legal status. Our point is that the court will not find a "legislative grant of standing or capacity," in the IGO ordinance or anywhere else.

The Inspector General also misplaces reliance on an out-of-state case, see City of NewYork v. City Civil Service Commission, 458 N.E.2d 354 (N.Y. 1983), and cases at the federal, see United States v. Nixon, 418 U.S. 683 (1974), and county, see Burnette v. Stroger, 389 Ill. App. 3d 321 (2009), levels. See IG Br. 12-15. None employs "[t]he Aman factors," IG Br. 14, and each is inapposite. City of New York addressed whether, under New York

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organizational structure plainly does not change depending on the claim. Kentucky v. Graham, 473 U.S. 159 (1985), see IG Br. 31, merely distinguished between personal- and official-capacity suits for purposes of imposing damages liability, see id. at 166, and is not to the contrary.

law, a municipal personnel department could seek review of the administrative decision of a municipal civil service "appeals board," 60 N.Y.2d at 442. Like Aman and unlike here, City of New York arose in the peculiar context of administrative review of an agency decision, id. at 441.

Nixon was an intra-executive federal dispute, and the Court found justiciability "[i]n light of the uniqueness of the setting in which the conflict ar[ose]." 418 U.S. at 697. There, a Special Prosecutor issued a subpoena to the President in the course of a criminal prosecution to produce certain material relating to his conversations with aides and advisers. Id. at 686. Nothing remotely like the constitutional crisis in Nixon is presented here, but regardless the federal government is not a municipal corporation, so constraints applying to such corporations do not apply. Nor is the Inspector General, who is not even a prosecutor, anything remotely like the Special Prosecutor, to whom the Attorney General expressly delegated "plenary authority to control the course of investigations and litigation" and represent the United States in litigation arising from offenses relating to a presidential election (including the power to "contest the invocation of executive privilege . . . "). See 418 U.S. at 694-95 & n.8. The Special Prosecutor, in fact, issued the subpoena during a criminal prosecution he initiated under that authority, see id. at 687-88; and that is why the Court found the dispute was "within the traditional scope of Art. III power," id. at 697. As for Burnette, the dispute there, between the Public Defender and the elected Cook County

board president is different from this one on both sides -- it involved a state-created official serving a state function at the county level and an elected official. See 389 Ill. App. 3d at 322; see also Ill. Const., art. 7, § 4(b).

Pace v. RTA, 346 Ill. App. 3d 125 (2003), see IG Br. 12 n.8, actually undermines the Inspector General's position. That case did not hold that a "mere 'division' of the [RTA] could sue its 'parent' body." Id. Pace is not "merely . . . one of [RTA's] operating divisions," but has "separate . . . legal existence." 346 Ill. App. 3d at 143. Although the governing statute does not grant Pace formal corporate status, it expressly confers on Pace all but one of the powers of the RTA, itself a "municipal corporation," 70 ILCS 3615/1.04 (2010), including "most notably" "the power to sue and be sued"; to adopt, amend, and repeal bylaws, rules and regulations, and ordinances; to own property; and to enter into contracts -- everything except the power to enter private land to make surveys or other examinations. Pace, 346 Ill. App. 3d at 142; see also 70 ILCS 3615/2.20(a) (i), (iii), (iv), (v), (vi). Indeed, the court noted that Pace is "in substance . . . very similar" to the Chicago Transit Authority, a municipal corporation, so there was "no reason to treat them differently." Pace, 346 Ill. App. 3d at 143. The court even analogized RTA and Pace to parent and subsidiary corporations, "which are distinct legal entities." Id. The Inspector General cannot credibly claim similar status.

In fact, in order to confer such status, City Council would have had to

act by referendum. See CC Br. 14-16.[3] As we explain, the constitution requires approval by referendum for a home-rule unit to "adopt, alter or repeal a form of government provided by law." Reading the IGO ordinance to create an appointed executive officer who is legally independent from the City would dilute the chief executive's power. See id. This would alter the City's form of government because it would change the balance of power between the executive and legislative branches. See id. In response, the Inspector General contends legislation affecting only one governmental branch requires no referendum. See IG Br. 34. That is not the test, see CC Br. 14-15, and neither Allen v. Cook County, 65 Ill. 2d 281 (1976), nor Peters v. Springfield, 57 Ill. 2d 142 (1974), supports this. In Allen, the legislation did not alter the constitutionally specified balance of power between City and suburban commissioners on the county's board of commissioners. See 65 Ill. 2d at 292-93. Peters rejected a referendum requirement because a municipality's civil service system is not part of its form of government. See

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[3] The Inspector General briefs this issue, but erroneously states it is waived. See IG Br. 33-35. Expanded treatment of an argument raised fairly below does not result in waiver. See, e.g., Pineschi v. Rock River Water Reclamation District, 346 Ill. App. 3d 719, 723 (2004) (argument against fee award not waived because it "relate[d] to the general issue" whether default judgment was "equitable"). The referendum argument further develops our point that City Council took no steps to give the Inspector General separate legal status or capacity to sue. C. 57 (internal quotations omitted); C. 118; see Ill. App. Ct. No. 1-10-1152, Brief and Appendix of Defendant-Appellee 38-39. Regardless, waiver does not constrain the court, which may address fully briefed legal issues like this, even if not raised below. See, e.g., Committee for Educational Rights v. Edgar, 174 Ill. 2d 1, 11 (1996). That is especially so where the "public interest favors consideration of the merits," id. at 12, which is true for an issue relating to the scope of governmental power.

57 Ill. 2d at 149. Moreover, the legislation in Evanston v. Create, Inc., 85 Ill. 2d 101 (1981), see IG Br. 34, did not set up a municipal corporation or other entity with legal existence separate from Evanston.

II. THE INSPECTOR GENERAL LACKS THE CAPACITY TO SUE.

"[E]xplicit steps" are required to grant a municipal department capacity to sue, 17 McQuillin, supra, § 49:2, and the City took none with respect to the IGO. See CC Br. 21-30. The Inspector General cannot sue in his own name because he lacks independent legal status, and cannot sue as the City because he has no litigating authority. The City Council vested that authority and related powers solely in the Corporation Counsel. See Municipal Code of Chicago, Ill. § 2-60-020(a), (b).[4]

The Inspector General imagines that the IGO ordinance "confers comprehensive authority" on him "respecting . . . enforcement of subpoenas." IG Br. 21. It does not. The only mention of "enforce[ment]" comes as a restriction and not as a grant of power, stating the Inspector General "shall take no action to enforce" a subpoena or "initiate prosecution" for seven days after an objection is made. Municipal Code of Chicago, Ill. § 2-56-040. This

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[4] The appellate court separately addressed jurisdiction and capacity. See A7-A9; A9-A16. The Inspector General agrees these are "conceptually distinct," IGO Br. 21, but says our arguments are the same, IG Br. 30-31 n.17. There are two barriers to this suit, either of which requires dismissal. First, the Inspector General lacks legal status separate from the City, so an official-capacity suit by him against another appointed official is intra-corporate and nonjusticiable. Second, he lacks authority to bring lawsuits that are effectively in the City's name against anyone; only the Corporation Counsel may do so.

restriction would be an exceedingly odd way to grant litigating authority. "[S]hall take no action" does not mean "bring suit," "file suit," or even "bring an action" -- and in all events it does not authorize someone other than the City's lawyer to go to court and file an enforcement lawsuit. Nor does the IGO ordinance "direct the Inspector General's actions" when negotiations over an objection fail, as the appellate court acknowledged, A11; the majority simply read litigating authority into the ordinance, A13. The Inspector General implies it would "frustrate" the IGO ordinance's "central purpose" to conclude it confers no litigating authority, IG Br. 22; see also id. at 29-30, but the ordinance's purpose is reflected in the powers City Council gave him, see IG Br. 23, not those he would prefer. It frustrates nothing to read the ordinance by its terms. His approach also fails since a court may not re-write an enactment's plain language based on its view of the law's purpose, see, e.g., People v. Woodard, 175 Ill. 2d 435, 443 (1997), as the majority did here.

This does not make IGO subpoenas unenforceable. The Inspector General can attempt to resolve objections and obtain sought-after materials through negotiations. And when he desires enforcement by way of a lawsuit, he must ask the Corporation Counsel to do so, see CC Br. 25-26, just as other departments go to the Corporation Counsel for legal matters. That procedure is faithful to the IGO ordinance, see IG Br. 22, which, again, says nothing about authority to sue. Other ordinances do, see CC Br. 24-26, and grant the Corporation Counsel authority over all the City's "law business," and