

It is my opinion and you are hereby advised that the Secretary of Education may authorize school districts to permit nonpublic school students to join public school field trips under the authority of Section 1361 of the Public School Code. You are further advised that in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), you will not in any way be liable for following the advice set forth in this opinion.

Sincerely,

Ernest D. Preate, Jr.
Attorney General

OFFICIAL OPINION NO. 89-4

*Department of General Services—Board of Commissioners of Public Grounds and Buildings—
Sections 402 and 404 of the Fiscal Code—Auditor General.*

1. The Fiscal Code and the Constitution preclude the Auditor General from serving on the Board of Commissioners of Public Grounds and Buildings.
2. Attorney General's Opinion No. 9 of 1977 was correct in its conclusion and is affirmed.

August 18, 1989

Honorable David L. Jannetta
Secretary
Department of General Services
515 North Office Building
Harrisburg, PA 17120

Dear Secretary Jannetta:

You have requested my official opinion on the question of whether the Auditor General may serve as a member of the Board of Commissioners of Public Grounds and Buildings (Board). The Board is made part of the Department of General Services by Section 202 of the Administrative Code of 1929, 71 P.S. § 62. It is my opinion and you are hereby advised that the Constitution and the laws of Pennsylvania preclude the Auditor General from serving and, therefore, from voting as a member of the Board.

This question was addressed in Attorney General's Opinion No. 9 of 1977. In that Opinion, former Attorney General Robert P. Kane determined that Article VIII, Section 10 of the Pennsylvania Constitution and Sections 402 and 404 of the Fiscal Code, as amended by the Act of March 18, 1971, P.L. 110, No. 4, 72 P.S. §§ 402 and 404, together operate to bar the Auditor General from serving on the Board.

Article VIII, Section 10 of the Constitution provides that a Commonwealth officer whose approval is necessary for any Commonwealth financial transaction shall not be charged with auditing that transaction. Section 402 of the Fiscal Code requires the Auditor General, unless otherwise provided by law, to audit all Commonwealth financial transactions after their occurrence. Section 404 provides that no Commonwealth officer charged with auditing transactions after their occurrence shall approve the same transactions prior to their occurrence.

The Auditor General is assigned membership on the Board, along with the Governor and the State Treasurer, by Section 446 of the Administrative Code of 1929, 71 P.S. § 156. The principal function of the Board, however, is "to approve or disapprove all proposed leases for offices, branch offices, rooms and accommodations," Administrative Code of 1929, Section 2413, 71 P.S. § 643; and the Auditor General is clearly required by Section 402 of the Fiscal Code to audit all such leases.¹

The 1977 Opinion thus concluded that because serving on the Board would place the Auditor General in the position of initially approving and thereafter auditing the same transactions, the Constitution and Section 404 of the Fiscal Code bar such service. The Opinion rejected the notion that the approval function should prevail over the audit function. That interpretation, the Opinion observed, would yield the absurd and undesirable result of allowing Board transactions to go unaudited.

It is my opinion that the 1977 Opinion is still a correct statement of the law of Pennsylvania. I am supported in my opinion, moreover, by the subsequent decision of the Pennsylvania Supreme Court in *Lutz Appellate Printers, Inc. v. Commonwealth*, 485 Pa. 559, 403 A.2d 530 (1979), which confirmed that the Constitution and Section 404 of the Fiscal Code preclude the Auditor General from approving any contract or other transaction that the Auditor General is required by law to audit.

1. The Board also approves certain other incidental financial transactions. See Administrative Code of 1929, Section 2409, 71 P.S. § 639. Such transactions are also subject to audit by the Auditor General pursuant to Section 402 of the Fiscal Code.

In *Lutz*, the low bidder on a Commonwealth contract sought to enjoin the award of the contract to another bidder. The plaintiff named the Auditor General as a defendant because Section 2410 of the Administrative Code of 1929, 71 P.S. § 640, provides in part that “all contracts [for public printing and binding] shall be severally void, unless first approved by the Governor, the Auditor General, and the State Treasurer.” The Auditor General argued that the Fiscal Code withdraws the Auditor General’s authority to approve the contract that was the subject of the suit and that, therefore, he was not a proper party.

The Supreme Court agreed. The Court held that the broad language of Sections 402 and 404 of the Fiscal Code, read together, “expressly withdraw the Auditor General’s power under Section 2410 to approve the Department’s award of a ‘public printing and binding’ contract.” *Lutz, supra*, 485 Pa. at 572. The Court viewed as irrelevant that Section 2410 of the Administrative Code (like Section 2413 at issue here) merely directs the Auditor General’s “approval” of the award and does not require “an inquiry into the financial nature of the transaction.” *Id.* at 571-572.

You should further note that the same conclusion reached by me in this Opinion, by the Pennsylvania Supreme Court in *Lutz* and by Attorney General Kane in Opinion No. 9 of 1977 was reached in yet another analogous context by former Attorney General Israel Packel in Opinion No. 64 of 1973. The Act of May 21, 1931, P.L. 185, No. 113, established a board of trustees, consisting of the Governor, the Auditor General and the State Treasurer, to manage a fund established for the preservation of the Cornwall Furnace historical property in Lebanon County. Observing that the Auditor General’s approval of expenditures from the Cornwall Furnace Trust Fund would violate Section 404 of the Fiscal Code, the Attorney General determined that Section 404 prevails over the 1931 Act as the later-enacted statute, Statutory Construction Act, 1 Pa.C.S. § 1936, and that, therefore, the Auditor General is barred from serving as a trustee.

The Statutory Construction Act provides that the provisions of every statute are severable, unless the remaining valid provisions are incapable of being executed in accordance with the legislative intent. Statutory Construction Act, 1 Pa.C.S. § 1925. The 1973 Opinion applied that principle to conclude that deletion of the Auditor General as a trustee is not inconsistent with the purpose of the Act establishing the trust fund and that the approval of the Governor and the State Treasurer is sufficient to authorize expenditures from the fund.

Likewise, it is my conclusion that, for the reasons expressed in this

Opinion, the Auditor General is barred from serving on the Board of Commissioners of Public Grounds and Buildings, that deletion of the Auditor General from the Board is not inconsistent with the purpose of the Board's enabling act and that the approval of the Governor and the State Treasurer is sufficient to authorize leases for offices, branch offices, rooms and accommodations.

Indeed, the severability of the provision for participation by the Auditor General on the Board is manifest in the history of the Board's operation. Ever since then—Auditor General Robert P. Casey, following adoption of the Pennsylvania Constitution of 1968, determined that the law precluded him from serving on the Board, the Board has functioned solely on the votes of the Governor and the State Treasurer, executing the legislative mandate to approve or disapprove the subject Commonwealth lease transactions without any participation by the Auditor General.

Finally, you are further advised that in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(a)(1), you are required to follow the advice set forth in this Opinion and shall not in any way be liable for doing so.

Sincerely yours,

Ernest D. Preate, Jr.
Attorney General