changed his expense allowance from three percent of his commission to $10.50 per week. However, the evidence adduced demonstrated that Gordon's weekly expense exceeded his allowance by $5.16.

Our examination of the record shows that there was competent evidence to support the Examiner's finding that Gordon's vacation pay was funded by commissions, his weekly expense allowance did not exceed his expenses, and that both employment contracts paid Gordon straight commissions for selling insurance policies and collecting premiums. Any additional fringe benefits or office space and supplies Gordon received did not constitute payment of a salary.[5]

Accordingly, the order on review is

Affirmed.



DISTRICT OF COLUMBIA, Appellant,

v.

The GREATER WASHINGTON CENTRAL LABOR COUNCIL, AFL–CIO, Appellee,

Food and Allied Service Trades Council of Metropolitan Washington, Intervenor.

The GREATER WASHINGTON BOARD OF TRADE, Appellant,

v.

DISTRICT OF COLUMBIA, et al., Appellees.

Nos. 80–1311, 80–1312.

District of Columbia Court of Appeals.

Argued April 24, 1981.

Decided Jan. 28, 1982.

District of Columbia appealed from a judgment of the Superior Court of the District of Columbia, John F. Doyle, J., holding that the District of Columbia Workers' Compensation Act violated the District of Columbia Self-Government and Governmental Reorganization Act. The Court of Appeals, Pryor, J., held that: (1) Congress did not intend in the Self-Government Act to prohibit District from enacting legislation concerning workmen's compensation for the private sector; (2) the Workers' Compensation Act did not violate section of the Self-Government Act which prohibits Council from amending or repealing any Act of Congress "which concerns the functions or property of the United States"; (3) Council did not increase jurisdiction of the District of Columbia courts in violation of the Self-Government Act; (4) section of Self-Government Act which prohibits Council from passing any legislation relating to the local federal district court or any other court of the United States was not violated; and (5) trade association was properly denied intervention as of right and permissive intervention.

Affirmed in part; reversed in part.

1. District of Columbia ⇐4

Action by Congress within District of Columbia Self-Government and Governmental Reorganization Act expressly transferring the public workmen's compensation program to District of Columbia, in absence of a concurrent transfer of private employment workmen's compensation, did not reflect congressional intent to prohibit local government from legislating with respect to private workmen's compensation. Longshoremen's and Harbor Workers' Compensation Act, §§ 1 et seq., 39, 33 U.S.C.A. §§ 901 et seq., 939; D.C.Code 1981, §§ 1–204, 1–233(a)(3); 5 U.S.C.A. § 8101 et seq.

2. District of Columbia ⇐5

District of Columbia Workers' Compensation Act, which repealed existing work-

5. The first issue raised by Gordon concerned whether he was an employee of Provident rather than an "independent contractor." However, this court addressed that issue on Gordon's first appeal and held that he was an employee but that his status was not controlling on the applicability of the exemption because this section of the Act necessarily presupposes an employer/employee relationship. *Gordon, supra* at 1256.

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Exhibit No. 41

ties. Nothing in the moving papers submitted by the Intervenors convinces the Court that it should act otherwise than it has already done, or that it should alter or amend the position already taken in this cause. * * * The fact that the Court ultimately disagrees with the Defendant's [the District of Columbia's] position in no way diminishes the Court's respect for that position, nor the Court's conviction that the applicant's interest has been, is, and will be adequately and ably represented by the District of Columbia.

The court went on to rule that the circumstances presented did not warrant a different result with respect to Super.Ct.Civ.R. 24(b) (permissive intervention).

The Board of Trade contends that the trial court erred in denying its application for leave to intervene as of right, because the interest represented by the District government was different from the interest it sought to represent. Appellant asserts that the interest represented by the District involved only the general governmental interest of defending a local legislative enactment, while the Board sought to represent the peculiar economic interests of its constituency. The Board argues that since neither of the parties below presented any evidence bearing on the economic impact of the existing law on local employers, nor developed the legislative history of the Longshoremen's Act to the extent the Board sought to, it should have been allowed to present these matters to the court's attention.

In reviewing the denial of a motion to intervene as of right, we will reverse only if we conclude that a timely appellant was entitled to intervene as of right. *Vale Properties, Ltd. v. Canterbury Tales, Inc., supra*, 431 A.2d at 14. In *Calvin-Humphrey v. District of Columbia*, D.C.App., 340 A.2d 795, 800 (1975), we stated that in cases in which the government is a party, the right to intervene on the side of the government should not be granted lightly, for "[i]n most cases we will presume that representation by such authorities is adequate, especially when the issue in controversy is one of policy vested in the discretion of the city government." The Board of Trade did not make the kind of showing necessary under *Calvin-Humphrey* to overcome the presumption that the District adequately was representing its interest. Appellant sought neither to assert a different claim or defense nor to obtain an outcome different from that sought by the District. We conclude that the Board of Trade and the District government sought to present the same claim, *i.e.*, the authority of the Council to legislate on workmen's compensation for the private employment sector, and that appellant's interest was represented adequately by the government.

The Board of Trade attempted to present evidence concerning the economic impact of the Longshoremen's Act on local employers, as well as some legislative materials, to justify the action taken by the Council with respect to the Workers' Compensation Act. There is no indication that such data would have had any impact upon the decision of the trial court. The authority of the local legislature to enact the Workers' Compensation Act is derived solely from the Self-Government Act, regardless of the Act's effect on annual premiums paid by employers for workmen's compensation insurance. Moreover, as to the additional legislative materials proffered by the Board of Trade, we note that in considering whether to grant its application to intervene, the trial court reviewed that material and nevertheless found nothing to change the position it already had taken in the case. The trial court did not err in denying the Board of Trade's application for intervention as of right pursuant to Super.Ct.Civ.R. 24(a). Furthermore, given the facts and circumstances of this case, the court did not abuse its discretion in denying appellant permissive intervention under Super.Ct.Civ.R 24(b).

Affirmed in part; reversed in part.



CALVIN-HUMPHREY et al., Appellees-Petitioners,

v.

DISTRICT OF COLUMBIA, a Municipal Corporation, et al., Appellees-Respondents,

In Re Motion of Clarzell Green et al., Appellants-Proposed Intervenors.

No. 8306.

District of Columbia Court of Appeals.

Argued Sept. 11, 1974.

Decided June 23, 1975.

Suit was brought on behalf of city commercial property owners seeking declaratory judgment that practice of assessing commercial property at higher percentage of market value than residential property violated real estate taxation statute and the Fifth Amendment, and recovery of refund for allegedly excessive taxes paid in past years. The Superior Court, District of Columbia, Joseph Michael Hannon, J., denied proposed intervenors' motion to intervene on behalf of single-family residential property owners and all taxpayers other than commercial ones, and proposed intervenors appealed. The Court of Appeals, Kern, J., held that where instant litigation concerned taxpayers that proposed intervenors sought to represent, and District of Columbia, which had agreed to set up single level of assessment, and had not denied that its dual assessments violated statute and Fifth Amendment principles of equal protection, did not adequately represent such taxpayers, proposed intervenors should have been allowed to intervene on behalf of all taxpayers other than commercial ones.

Reversed and remanded for further proceedings.

1. Courts ⇐445(6)

Denial of leave to intervene as of right under District of Columbia Superior Court rule is final order appealable immediately to Court of Appeals. D.C.C.E. SCR, Civil Rule 24(a)(2).

2. Courts ⇐444.7(1)

In determining whether proposed intervention is proper under District of Columbia Superior Court rule relating to intervention as of right, rather than attempting to precisely define "interest" required for intervention, inquiry should be made as to whether intervention promotes judicial economy by facilitating resolution of related issues in single lawsuit while preventing litigation from becoming unmanageably complex. D.C.C.E. SCR, Civil Rule 24(a)(2).

3. Declaratory Judgment ⇐306

Where, inter alia, class of taxpayers sought to be represented by purported intervenors in suit brought on behalf of city commercial property owners seeking declaratory judgment that practice of assessing commercial property at higher percentage of market value than residential property violated real estate taxation statute and the Fifth Amendment had economic interest in outcome of suit, and District of Columbia, which had agreed to set up single level of assessment and had not denied that its dual assessments violated statute and Fifth Amendment principles of equal protection, did not adequately represent such taxpayers, proposed intervenors should have been allowed to intervene under District of Columbia Superior Court rule on behalf of all taxpayers other than commercial ones. D.C.C.E. § 47-713; D.C.C.E. SCR, Civil Rule 24(a)(2); U.S.C.A.Const. Amend. 5.

4. Declaratory Judgment ⇐306

Where commercial taxpayers had already instututed suit attacking legality of District of Columbia's use of dual levels of assessment of real estate, and District refused to join issue on such question, suit should have been broadened by permitting intervention under District of Columbia

believe that the position sought to be asserted by the Green taxpayers should be heard, and that it can be heard most efficiently and effectively in the context of this litigation.[16]

[5, 6] Undoubtedly, taxpayer intervention in suits in which the government is a party should not lightly be granted.[17] In this case, however, we believe that intervention is appropriate. The subject on which intervention is sought bears a logical relationship to the proposed intervenors' status as taxpayers and is presented in the form of a concrete legal issue rather than simply a disagreement over policy. *Compare Hobson v. Hansen, supra,* 44 F.R.D. at 27–29, 5 A.L.R. Fed. at 509–13. In our view the focus in suits of this nature should not be on a rigid definition of the interest required for taxpayer intervention, but on the adequacy of representation afforded by municipal authorities.[18] In most cases we will presume that representation by such authorities is adequate, especially when the issue in controversy is one of policy vested in the discretion of the city government. *See* 3B J. Moore, Federal Practice ¶ 24.08[5] (2d ed. 1974); 7A C. Wright & A. Miller, Federal Practice and Procedure § 1908 at 499, § 1909 at 528–29 (1972). We will discuss below the adequacy of representation in this case.

The second requirement of Rule 24 is that the outcome of the suit may, as a practical matter, impair or impede the proposed intervenor's ability to protect his interest.

[7] Taking a practical approach to this problem, it is likely that the outcome of this litigation will finally determine the disposition of the claim by Calvin-Humphrey for $60 million in tax refunds. In addition, it is likely that the question of the legality of the use of dual levels of assessment will be reached and decided in this case.[19] We must recognize first that the stare decisis effect of a decision alone may be a sufficient practical disadvantage to warrant intervention. *Nuesse v. Camp, supra; Atlantis Development Corp. v. United States,* 379 F.2d 818 (5th Cir. 1967). It would be difficult for the intervenor to secure a decision on the issue in any subsequent litigation contrary to the one to be reached in this case. In addition, we consider the difficulty which the intervenors would face in framing a separate lawsuit to present for adjudication the question at issue in the first lawsuit. *Smuck v. Hobson, supra.* The intervenors are seeking to defend the legality of the use of dual levels of assessment, and the only practical way for them to do so is in this suit, which seeks a declaration of the invalidity of the practice. Therefore, we feel that Green has also satisfied the second criteria of the rule.

We turn now to the final requirement of Rule 24, *viz.,* that the interest of the intervenor not be adequately represented by the existing parties.[20] We will indulge the

16. We agree with appellants that its interest would not be adequately protected by its appearance only as amicus curiae, a status both appellees appear willing to accept. Rather, the position it seeks to assert demands the ability to adduce evidence as well as to advance legal argument.

17. *See Arvida Corp. v. City of Boca Raton,* 59 F.R.D. 316 (S.D.Fla.1973). *But see Cleveland v. Cities Service Oil Co.,* 47 F.R.D. 543 (N.D.Ohio 1969).

18. We note that in a number of cases intervention on the side of the United States Government has been permitted when representation is found inadequate. *Trbovich v. United Mine Workers, supra; Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co., supra; Nuesse v. Camp, supra; Atlantic Refining Co. v. Standard Oil Co., supra.*

19. Calvin-Humphrey is claiming refunds on the ground that use of dual levels of assessment is unlawful. The trial court will be required to reach the issue if it rules against the District on the procedural and jurisdictional defenses which the city has raised.

20. We do not find it necessary in this case to decide where the burden of proof on this issue lies. *Compare Trbovich v. United Mine*

presumption in most cases that government officials adequately represent the public. We cannot agree with appellees in this case, however, that representation by the District must *always* be deemed adequate unless it can be shown that there is collusion betweeen the parties, that the interest of the representative is adverse to that of the intervenor, or that the representative has failed in his duty vigorously to prosecute or defend the suit. *See United States v. Board of School Commissioners,* 466 F. 2d 573 (7th Cir. 1972), *cert. denied,* 410 U.S. 909, 93 S.Ct. 964, 35 L.Ed.2d 271 (1973). The Supreme Court has in our view rejected such a rigid approach to the representation requirement. In *Trbovich v. United Mine Workers, supra,* the Court held it was unnecessary for the proposed intervenor to demonstrate that the public official on whose side he wished to intervene had failed in fulfillment of his statutory duty of representation. It was sufficient in that case that the representative was under two duties which might dictate different approaches to the litigation, and that the intervenor wanted to assert grounds in addition to those asserted by the representative.[21]

The United States Court of Appeals for the District of Columbia Circuit has found inadequate representation where the intervenor wants to assert a different or additional ground in support of the representative's position, *Atlantic Refining Co. v. Standard Oil Co., supra;* or to represent a narrower interest, *Smuck v. Hobson, supra;* or a broader interest, *Nuesse v. Camp, supra,* than does the original party.

The District of Columbia government must represent the interest of *all* taxpayers and of the community at large, *including that of the commercial taxpayers represented by Calvin-Humphrey,* and it is not in this case representing the narrower interest of the *Green* taxpayers in preserving their relative tax advantage vis-a-vis the commercial property taxpayers. More importantly, the city has chosen not to assert, on a concrete question of law, a defense to support their common interest in preventing the award of refunds which the intervenors wish to present to the trial court. On the particular facts of this case, we cannot say that the intervenors are adequately represented by the District government, notwithstanding its good faith belief that it is acting in the best interest of the city at large.

Accordingly, the amended motion for leave to intervene should have been granted, and the trial court erred in denying it. The order appealed from is reversed and the case remanded for further proceedings.[22]

So ordered.

Workers, supra, 404 U.S. at 538 n. 10, 92 S.Ct. 630, with *Nuesse v. Camp, supra,* 128 U.S.App.D.C. at 180, 385 F.2d at 702.

21. In *Trbovich,* a union member was allowed to intervene in an action brought by the Secretary of Labor to set aside a union election, even though the Secretary was required by statute to represent the interests of all union members in such proceedings. The Court found that the Secretary was also under a duty to represent the public interest in free union elections, and that as a result he might not adequately represent the interest of a union member who wanted to argue for remedies in addition to those proposed by the Secretary.

22. The District points out in its brief that Green has not moved to certify its suit as a class action, and suggests that he cannot fulfill the notice requirement imposed by Rule 23 of the Superior Court Civil Rules. We note that Rule 23 (the equivalent of Rule 23 of the Federal Rules of Civil Procedure) does not apply in the Tax Division of the trial court, where this action is presently pending. The question whether the intervenor should be allowed to proceed on behalf of a class will be before the trial court on remand.

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DISTRICT OF COLUMBIA COURT OF APPEALS

No. 01-CV-600 and No. 02-CV-305

JOY BOYLE, *et al.*, APPELLANTS,

v.

TERESA HERMINIA GIRAL, *et al.*, APPELLEES.

FILED 4-10-03
District of Columbia
Court of Appeals
Garland Pinkston, Jr.
Clerk

Appeals from the Superior Court of the
District of Columbia
(CA-7467-98)

(Hon. Geoffrey M. Alprin, Trial Judge)
(Hon. Joan Zeldon, Trial Judge)

(Argued April 24, 2002 and March 25, 2003 Decided April 10, 2003)

George A. Barton, with whom *David Schertler* and *Lisa Fishberg* were on the briefs, for appellants.

John M. Majoras, with whom *Julie E. McEvoy* and *Heather Guilette Walser* were on the briefs, for appellee Settling Defendants.

Jeffrey A. Bartos, with whom *Jonathan Rolfe* and *Timothy D. Battin* were on the briefs, for appellee Class Plaintiffs.

Bennett Rushkoff, with whom *Robert R. Rigsby*, Corporation Counsel at the time the brief was filed for appeal No. 01-CV-600, *Arabella W. Teal*, Corporation Counsel at the time the brief was filed for appeal No. 02-CV-305, and *Charles L. Reischel*, Deputy Corporation Counsel, were on the briefs, for appellee District of Columbia.

Before TERRY, FARRELL and REID, *Associate Judges*.

REID, *Associate Judge*: Before us are consolidated appeals involving challenges to the trial court's (1) denial of motions to intervene filed by appellants Joy Boyle, Daniel Owen and others (collectively "the consumer class member objectors") in a class action suit against various vitamin product manufacturers and distributors; and (2) final approval of the class action settlement agreement which, instead of a distribution to individual members of

interests of the [c]onsumer [c]lass in the pursuit of a satisfactory remedy for the [c]ommercial [c]lass members." Indeed the record on appeal is absolutely devoid of any hint of a conflict of interest by class counsel, and the allegation was not even aired during the Fairness Hearing.

There is an additional reason why the consumer class member objectors' conclusory conflict of interest allegation must be rejected. The District government, through its chief legal officer, the Corporation Counsel, participated in the settlement negotiations on behalf of District residents. A presumption of adequate representation exists where the government is involved. *See District of Columbia v. Greater Washington Cent. Labor Council*, 442 A.2d 110, 120 (D.C. 1982); *see also In re Toys "R" Us Antitrust Litig.*, 191 F.R.D. 347, 351 (E.D.N.Y. 2000) ("[T]he participation of [government attorneys] furnishes extra assurance that consumers' interests are protected."). Since there is nothing in the record that rebuts that presumption, we conclude that the interests of the consumers were protected not only by class counsel, but also by government counsel. In fact, the trial court's determination that no conflict of interest existed is compelling in the absence of any factual record showing an actual or potential conflict of interest on the part of class counsel. As the court stated:

> The Court finds no conflict of interest [traceable to class counsel's representation of] both the [consumer class] and the [commercial class]. No objection based on any alleged conflict of interest has been raised by anyone other than lead counsel for the four individual objectors (who did not argue this point in the Fairness Hearing).