Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	)	
D.C. Nurses Association Complainant	)	PERB Case Nos. 17-U-09, 17-U-21, 17-U-23, and 17-RC-01
v.	)	
Not-for-Profit Hospital Corporation Respondent	)	
and	)	Opinion No. 1669
National Association of Special Police and Security Officers Petitioner	)	
v.	)	
Not-for-Profit Hospital Corporation Respondent	)	

DECISION AND ORDER

The Executive Director administratively dismissed for lack of jurisdiction four cases involving the Not-for-Profit Hospital Corporation ("the Corporation"). Three of the cases were filed by the D.C. Nurses Association, and one was filed by the National Association of Special Police and Security Officers. Motions for reconsideration of the dismissals were filed with the Public Employee Relations Board ("Board" or PERB") by the Corporation and the D.C. Nurses Association ("Movants"). For the reasons explained in this decision and order, the Board finds that it lacks jurisdiction over the cases and that the motions for reconsideration offer no reason for reaching a different result. Accordingly, the motions are denied.

I. Statement of the Case

Four cases were filed with the Board naming the Corporation as respondent. Three of the cases are unfair labor practice cases brought by the D.C. Nurses Association, namely, *D.C. Nurses Association v. Not-for-Profit Hospital Corp., aka United Medical Center*, PERB Case No. 17-U-09; *D.C. Nurses Association v. Not-for-Profit Hospital Corp. (United Medical Center)*, PERB Case No. 17-U-21; and *D.C. Nurses Association v. Not-for-Profit Hospital Corp., aka*

United Medical Center, PERB Case No. 17-U-23. The fourth case is a representation case brought by the National Association of Special Police and Security Officers, namely, *National Association of Special Police and Security Officers v. United Medical Center*, PERB Case No. 17-RC-01. On September 25, 2017, the Executive Director administratively dismissed all four of the cases. Citing sections 44-951.08(a) and 44-951.10(b) of the D.C. Official Code, the Executive Director stated that the Board was without jurisdiction to adjudicate the cases.

On October 25, 2017, two motions for reconsideration were filed in response to the dismissals. The Corporation and the Nurses Association jointly moved that the Board reconsider the Executive Director's dismissal of the unfair labor practice cases. The Corporation separately moved that the Board reconsider the Executive Director's dismissal of the representation case. The National Association of Special Police and Security Officers, the petitioner in the representation case, did not join in that motion for reconsideration.

The texts of the two motions for reconsideration ("Motions") are nearly identical, with only a few minor variations in wording. The Motions take the position that "the conduct of the District government, the D.C. Council and the Public Employee Relations Board precludes a finding that the PERB does not have jurisdiction."[1] Movants argue that the Board should continue to exercise jurisdiction over the Corporation, as it has done, and that failure to do so would violate the Due Process Clause of the U.S. Constitution.

The procedural fact that one of the Motions was filed jointly has no effect on the merits of the case. Parties cannot confer jurisdiction by their consent, agreement, or acquiescence.[2] Because the Motions pending in the four cases ("Cases") present the same issues, the Board has consolidated the Cases.[3] The Motions are before the Board for disposition.

II. The Jurisdiction of the Board

As an administrative agency, PERB is a creature of statute; it may not act in excess of its statutory authority.[4] Two statutes govern the Board's jurisdiction in the Cases: the Comprehensive Merit Personnel Act of 1978, Chapter 6 of Title 1 of the D.C. Official Code,[5] ("the CMPA") and the Not-for-Profit Hospital Corporation Establishment Amendment Act of 2011, Chapter 9A of Title 44 of the D.C. Official Code,[6] ("the Corporation Establishment Act").

A. The CMPA

The CMPA states a policy in favor of collective bargaining between the District of Columbia government and its employees.[7] It sets forth rights and obligations of employees, labor organizations, and management. Subchapter V of the CMPA creates the Public Employee

[1] Motions at 1-2.
[2] *Hewsen v. Lynch*, 343 A.2d 45, 47 (D.C. 1975); *Guardian Investment Corp. v. Rubenstein*, 192 A.2d 296, 299 (D.C. 1963).
[3] *See AFGE v. Gov't of D.C. and AFSCME, Council 20 v. Gov't of D.C.*, 36 D.C. Reg. 235, Slip Op. No. 199, PERB Case Nos. 88-U-04 and 88-U-09 (1988).
[4] *See Dist. Intown Props. Ltd. v. D.C. Dep't of Consumer & Regulatory Affairs*, 680 A.2d 1373, 1379 (D.C. 1996).
[5] D.C. Official Code §§ 1-601.01-1-636.03.
[6] *Id.* §§ 44-951.01-44-951.18.
[7] *Id.* §§ 1-601.02(a)(6): 1-617.01(a).

Relations Board. Subchapter XVII gives the Public Employee Relations Board jurisdiction over various types of actions involving District employees, including those that the Cases attempt to present, i.e., actions to certify exclusive bargaining unit representatives[8] and claims that unfair labor practices have been committed.[9]

The CMPA defines employee to "mean[], except when specifically modified in this chapter, an individual who performs a function of the District government and who receives compensation for the performance of such services."[10] In section 1-602.01, entitled "Coverage; exceptions," the CMPA specifies the employees that it covers. Section 1-602.01provides:

> (a) Except as provided in subsection (c) of this section, unless specifically exempted from certain provisions, this chapter shall apply to all employees of the District of Columbia government, except the Chief Judges and Associate Judges of the Superior Court of the District of Columbia and the District of Columbia Court of Appeals and the nonjudicial personnel of said Courts. With the exception of subchapters V and XVII of this chapter, and § 1-608.01(e), employees of the D.C. General Hospital and the D.C. General Hospital Commission shall be exempt from the provisions of this chapter.
>
> (b) Repealed.
>
> (c) The provisions of subchapter XV-A[11] shall apply to employees of the Council and all District agencies, including, but not limited to employees of subordinate agencies, independent agencies, the District of Columbia Board of Education, the Board of Trustees of the University of the District of Columbia, the District of Columbia Housing Authority, and the Metropolitan Police Department.
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> (d) With the exception of subchapters V, XXVII, XV-A, XXI, XXII, XXIII and XXVI, employees of the District of Columbia Housing Authority shall be exempt from the provisions of this chapter.

As the title of section 1-602.01 implies, there are many exceptions to the application of the CMPA to employees of the District of Columbia government. Section 1-602.01(a) exempts the Superior Court, the Court of Appeals, the D.C. General Hospital, and the D.C. General Hospital Commission. Section 1-602.01(d) exempts employees of the Housing Authority from most chapters of the CMPA. Section 1-602.03(a) and (b) exempts educational employees from some chapters of the CMPA. A statute outside of the CMPA but within Title 1, section 1-

[8] *Id.* § 1-605.02(2)
[9] *Id.* § 1-605.02(3).
[10] *Id.* § 1-605.02(2)
[11] Whistleblower Protection

204.25(a), exempts employees of the Office of the Chief Financial Officer from all of the CMPA, stating that they "shall be considered at-will employees not covered by Chapter 6 of this title."

The Movants claim that employees of the Corporation are similarly situated to other employees of the District of Columbia who are covered by the CMPA.[12] But employees of the Corporation are also similarly situated to employees who are not covered by the CMPA. In addition, the exempted employees are also similarly situated to other employees of the District.

Exemptions for the employees of the Corporation appear in the next statute to be considered, the Corporation Establishment Act.

B. The Corporation Establishment Act

In section 44-951.02(a), the Corporation Establishment Act provides, "There is established as an instrumentality of the District government the Not-for-Profit Hospital Corporation, which shall have a separate legal existence within the District government." As the Corporation is "an instrumentality of the District government . . . within the District government," it is fair to conclude that its employees perform a function of the District government and thus would fall within the CMPA's definition of employee if the CMPA applied to them.[13] However, officers and employees of the Corporation are not District government employees for purposes of subchapter II of Chapter 4 of Title 2 ("Non-Liability of District Employees").[14]

The primary purposes of the Corporation are to take over the assets of the United Medical Center, to ensure the continued operation of that hospital, and to sell or transfer the hospital if a qualified buyer is found.[15] The Corporation is empowered to do "any and all things necessary and proper to carry out its corporate purposes."[16] The Corporation Establishment Act establishes a board of directors and vests the powers of the Corporation in the board of directors.[17]

In three different places, the Corporation Establishment Act forecloses the operation of the CMPA within its ambit, exempting from the CMPA employees of the Corporation, employees transferred to the Corporation, and the Corporation itself. Regarding employees, section 44-951.08(a) states, "Chapter 6 of Title 1 shall not apply to employees of the Corporation." Regarding transferred employees, section 44-951.10(b) states, "The employees transferred from the United Medical Center to the Corporation shall not be governed by Chapter 6 of Title 1, or its implementing regulations and shall not enjoy any rights, benefits, or obligations afforded by Chapter 6 of Title 1." Finally, with regard to the Corporation itself, section 44-951.08(f) states, "The Corporation shall have independent personnel authority, including the authority to establish its own personnel system, and shall not be subject to Chapter

[12] Motions at 15.
[13] D.C. Official Code § 1-603.01(7). *See* Motions at 9 n.7.
[14] D.C. Official Code § 44-951.14(a).
[15] D.C. Official Code § 44-951.02(b). For background on the transfer of the United Medical Center to the Corporation, see *UMC Development, LLC v. District of Columbia*, 120 A.3d 37, 38-40 (D.C. 2015).
[16] *Id.* § 44-951.06(20).
[17] *Id.* §§ 44-951.04, 44-951.05.

6 of Title 1 or its implementing regulations." The Corporation Establishment Act also makes governmental procurement law, Chapter 3A of Title 2 of the D.C. Official Code, inapplicable to the Corporation.[18]

The Movants admit that "it clearly states in the D.C. Code that UMC employees shall not enjoy any rights and benefits afforded by the CMPA."[19] Despite that admission, the Movants attempt to suggest that the City Council intended something other than what it clearly and repeatedly said. The Movants claim that the Council has subsequently confirmed collective bargaining agreements of the Corporation under section 1-617.17 "and other CMPA procedures."[20] The Movants argue that by confirming collective bargaining agreements of the Corporation, the Council has made clear its intention that the CMPA should apply to the Corporation.[21] Exhibits to the motion the Corporation filed separately reflect that proposed resolutions approving pursuant to sections 44-951.02 and 1-617.17 the compensation provisions of agreements were submitted to the Council in 2015 and 2016.[22] Speculation over the meaning of a Council's adoption of such proposals cannot shed any light on the intent of an earlier Council in enacting sections 44-951.08 and 44-951.10 or render the plain language of those sections ambiguous. The D.C. Court of Appeals has said that the views of a subsequent legislature are a hazardous basis upon which to infer the intent of an earlier one.[23]

The Movants also claim without support that the Council passed the Corporation Establishment Act with the intention that it would be a temporary resolution.[24] The act contains no sunset clause. Repeal of a law is as much a legislative function as is the enactment of a law.[25]

The Movants' arguments for the proposition that the Council must have intended the opposite of what it clearly stated, although inventive, are unavailing. Where, as here, a statute is clear on its face, there is no need to search for legislative intent.[26] The Board cannot "read into an unambiguous statute language that is clearly not there."[27]

C. Reconciling the CMPA with the Corporation Establishment Act

Because the terms of the Corporation Establishment Act cannot be simply disregarded, as the Movants advocate, the two acts must be reconciled. On the one hand the CMPA states that "unless specifically exempted from certain provisions, this chapter shall apply to all employees of the District of Columbia government."[28] On the other hand, the Corporation Establishment Act provides that Chapter 6 of Title 1 does not apply to employees of the Corporation,[29] to

[18] D.C. Official Code § 44-951.11(a).
[19] Motions at 7.
[20] Motions at 6.
[21] Motions at 6, 7.
[22] Mot. for Recons. Case No. 17-RC-01 Ex. 2 part 1 at 7-8, part 2 at 7-8, & part 3 at 7-10.
[23] *Twin Towers Plaza Tenants Ass'n, Inc. v. Capitol Park Assocs., L.P.*, 894 A.2d 1113, 1120 n.14 (D.C. 2006).
[24] Motions at 7.
[25] *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 113-14 (1953).
[26] *Butler v. Butler*, 496 A.2d 621, 622 (D.C. 1985).
[27] *Carter v. State Farm Mut. Auto. Ins. Co.*, 808 A.2d 466, 472 (D.C. 2002).
[28] D.C. Official Code § 1-602.01(a).
[29] *Id.* § 44-951.08(a).

employees transferred to the Corporation from the United Medical Center,[30] or to the Corporation.[31]

The D.C. Court of Appeals has said that "to the extent possible, we attempt to harmonize statutes, not read them in a way that makes them run headlong into one another."[32] The two acts can be harmonized by recognizing that section 1-602.01's phrase "unless specifically exempted from certain provisions" exempts the Corporation's employees from the CMPA. This is because the Corporation's employees are specifically exempted by the Corporation Establishment Act from all provisions of the CMPA. Thus, the acts dovetail perfectly.

It could be argued that the acts cannot be harmonized in that way because the Corporation Establishment Act does not specifically exempt employees of the Corporation "from certain provisions" of the CMPA, as section 1-602.01(a) permits. Rather, it exempts them from the entire chapter. While statutes should be harmonized if possible, when that is not possible the more specific statute prevails over the more general and the later supersedes the earlier.[33] Reconciling laws so that they make sense in combination assumes that the implication of a statute may be altered by a later statute, especially where the earlier statute is broad but the later statute addresses the topic at hand.[34] The principle that a specific statute prevails over a general one is particularly true of jurisdictional provisions.[35]

Employing those principles inescapably leads to the conclusion that, to the extent there is a conflict between the Corporate Establishment Act and the CMPA, the Corporation Establishment Act prevails. Sections 44-951.08 and 44-951.10 are more specific than section 1-602.01(a) because they concern only one entity and state an exception to a general rule. The Corporation Establishment Act is not only the more specific but also the later of the two acts. Even so, a specific statute creates exceptions to a general statute regardless of the priority of enactment.[36] Because a specific statute will not be controlled or nullified by a general one,[37] the rights, obligations, policies, and procedures set forth in the CMPA do not apply to the Corporation or its employees.

All of the foregoing means of reconciling the statutes lead to the same conclusion: sections 44-951.08 and 44-951.10 must be regarded as exemptions from section 1-602.01(a). The Movants say nothing to the contrary; they do not discuss the decisive issue of how the statutes should be read together. Instead they argue that the Corporation's management, employees, and unions have relied to their detriment on the Board's exercise of jurisdiction in past cases involving the Corporation. As we explain below, this claim is immaterial.

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[30] *Id.* § 44-951.10(b).
[31] *Id.* § 44-951.08(f).
[32] *District of Columbia v. Am. Univ.*, 2 A.3d 175, 187 (D.C. 2010).
[33] *George Washington Univ. v. D.C. Bd. of Adjustment*, 831 A.2d 921, 943 (D.C. 2003).
[34] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000).
[35] *Tulsa Airports Improvements Trust v. United States*, 120 Fed. Cl. 254, 262 (2015).
[36] *Brown v. Consol. Rail Corp.*, 717 A.2d 309, 313 (D.C. 1998); *Sanford v. Sanford*, 32 App. D.C. 315, 318, 286 F. 777, 780 (1923).
[37] *Brown v. Consol. Rail Corp.*, 717 A.2d at 313. "The applicable maxim of statutory construction is *generalia specialibus non derogant*, general words do not derogate from special." *Kentucky v. Schindler*, 685 S.W.2d 544, 545 (Ky. 1984).

D. Alleged Detrimental Reliance on Past Cases

1. Past Cases

The Movants contend that the Board has asserted jurisdiction over the Corporation's unfair labor practices and negotiations since 2013.[38] In reality, the Board has issued only one decision and order involving the Corporation, *Not-for-Profit Hospital Corp. v. Service Employees International Union, Local 1199*.[39] In that case, the union moved for dismissal on the ground that the Board lacked jurisdiction to enforce section 1-617.17(h)'s requirement of confidentiality in compensation negotiations. The Board held that it had jurisdiction over that type of claim because a violation of section 1-617.17(h) is cognizable as an unfair labor practice.[40] However, the Board found that the union did not commit an unfair labor practice.[41]

The five other unfair labor practice cases involving the Corporation that the Movants listed were voluntarily withdrawn. There have been two impasse cases involving the Corporation. One was referred to an arbitrator and closed, and the other was dismissed when the parties agreed they were no longer at impasse.

Although we must acknowledge the past confusion, whatever the Board has done in the past is irrelevant to its jurisdiction because nonexistent powers cannot be acquired by prescription through unchallenged exercise.[42] In *Christ the King Regional High School v. Culvert*,[43] the court gave no weight to the fact that the National Labor Relations Board had previously handled a few cases against a church-operated school over which it had no jurisdiction.[44] The D.C. Court of Appeals has said that "[a] court by its own words cannot create or extinguish its own subject matter jurisdiction."[45] Another court succinctly stated that a city's assessors "cannot acquire jurisdiction by deciding that they have it."[46] This Board cannot either.

The Movants caustically describe the Executive Director's dismissal of the Cases as "PERB's about-face and current abdication of its jurisdiction"[47] and claim that it "brings into serious question," "calls into question," "draws into question," and "opens up the question"[48] of the validity of PERB's prior rulings. There is no question. There was one prior ruling, and without question it is and was void *ab initio*. As the D.C. Court of Appeals has held, "The purported exercise of jurisdiction beyond that conferred upon the agency by the legislature is *ultra vires* and a nullity."[49] The decision and order in *Not-for-Profit Hospital Corp. v. Service Employees International Union* is hereby vacated. The nullity of that decision and order has no

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[38] Motions at 15.
[39] 63 D.C. Reg. 10683, Slip Opinion 1580, PERB Case No 15-U-10 (2016).
[40] *Id.* at 3.
[41] *Id.* at 9.
[42] *United States v. Morton Salt Co.*, 338 U.S. 632, 647 (1950).
[43] 815 F.2d 219 (2d Cir. 1987).
[44] *Id.* at 222-23.
[45] *Appeal of A.H.*, 590 A.2d 123, 129 (D.C. 1991).
[46] *Union S.B. Co. v. City of Buffalo*, 82 N.Y. 351, 356 (1880).
[47] Motions at 15.
[48] Motions at 6, 15, 16, 18.
[49] *Dist. Intown Props. Ltd. v. D.C. Dep't of Consumer & Regulatory Affairs*, 680 A.2d 1373, 1379 (D.C. 1996).

practical effect on the parties because the Board found no unfair labor practice and dismissed the case. The Board reached the right result although not for the right reason. The Board regrets the error, but no principle of administrative law consigns an agency to repeating a mistake into perpetuity.[50]

2. Alleged Detrimental Reliance

The Movants are not in a position to make a strong detrimental reliance argument. "[P]arties dealing with a public agency are bound at their peril to notice the measure of its authority."[51] The Movants did not take notice of the limits of the Board's authority. Even if the Movants had a better claim for equitable consideration, the outcome would be no different. Equitable considerations such as the detrimental reliance of litigants are altogether irrelevant in the absence of jurisdiction.[52]

Accordingly, we conclude that District of Columbia law expressly exempts the Corporation and all of its employees from Chapter 6 of Title 1. The Board's jurisdiction, including its jurisdiction over unfair labor practice and representation cases such as the consolidated Cases, comes exclusively from Chapter 6 of Title 1. Therefore, under District of Columbia law the Board has no jurisdiction over the Cases.

Having ascertained what District of Columbia law provides, we can now consider the Movants' constitutional claim.

III. The Constitutionality of Dismissing the Cases

As discussed, District of Columbia law withholds from the Board jurisdiction over the Corporation and its employees. The Movants do not contend that the law is unconstitutional. They contend that the Board's compliance with the law is unconstitutional. The two Motions make identical constitutional arguments. However, the headings above the argument in the two Motions are different. The heading in the motion filed by the Nurses Association and the Corporation in the unfair labor practice cases is: "PERB's dismissal of the instant cases would violate the Due Process Clause." The heading in the motion filed by the Corporation alone in the representation case is: "PERB's dismissal of the instant cases would violate the Equal Protection Clause." Although equal protection is in the heading of the latter motion, the Motions do not make an equal protection argument. They mention the Equal Protection Clause, and then proceed to make a procedural due process argument.

The Due Process Clause of the Fifth Amendment to the Constitution[53] provides, "No person shall be . . . deprived of life, liberty, or property without due process of law." The

[50] *Cleveland Nat'l Air Show, Inc. v. U.S. Dep't of Transp.*, 430 F.3d 757, 765 (6th Cir. 2005).
[51] *Treat v. Town Plan & Zoning Comm'n of the Town of Orange*, 143 A.2d 448, 449 (Conn. 1958). *See also Dade Park Jockey Club v. Kentucky*, 69 S.W.2d 314, 365 (Ky. 1933) ("Persons dealing with public bodies or public officials must take notice of their authority to act, since they can only act within the limits of the authority expressly or by necessary implication conferred upon them by law.").
[52] *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988); *Felzen v. Andreas*, 134 F.3d 873, 877 (7th Cir. 1998).
[53] The Fifth Amendment applies to the District of Columbia rather than the Fourteenth Amendment, which applies to the states. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

Movants correctly state one of the elements of a procedural due process claim: "In order to invoke the Fifth Amendment's procedural due process protection, an employee must show that a protected liberty or property interest is implicated."[54] The Supreme Court has stated that there are two steps in the analysis of a procedural due process claim: "We first ask whether there exists a liberty or property interest of which a person has been deprived, and if so we ask whether the procedures followed by the State were constitutionally sufficient."[55] In the present matter, we do not reach the second step because a deprivation of a liberty or property interest has not been shown.

A. Asserted Liberty Interest

The Movants do not contend that they were deprived of a liberty or property interest. Their position is that employees of the Corporation have a protected interest (presumably a liberty interest), which is the right to organize and bargain collectively.[56] The Corporation does not have standing to assert the procedural due process rights of its employees.[57] The Nurses Association, however, has standing to represent the interests of employees in its bargaining unit ("employees"),[58] as it does in the motion for reconsideration it jointly filed in the unfair labor practice cases.

In that motion, the Nurses Association contends that dismissal of the unfair labor practice cases will deprive the employees of their protected interest in organizing and bargaining collectively.[59] A protected liberty interest can be the liberty to exercise a constitutionally recognized fundamental right or a liberty interest created by statute.[60] The right of association protected by the First Amendment "encompasses the combination of individual workers together in order better to assert their lawful rights."[61] But there is no constitutional right to collective bargaining.[62] Due to the absence of such a constitutional right, if the employees have a protected liberty interest in collective bargaining, it must come from a statute, as the U.S. District Court for

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[54] Motions at 7 (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564 (1972)).
[55] *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (per curiam).
[56] Motions at 7.
[57] *See Pennsylvania v. State Conference of Police Lodges of the FOP*, 520 A.2d 25, 27 (Pa. 1987) (holding that a public employer lacked standing to assert that an arbitration award establishing a closed shop violated the constitutional rights of public employees who chose not to join the union); *Metro. Alliance of Police, Barrington Hills Police Chapter 576 v. Village of Barrington Hills (Police Dep't)*, No. S-RC-10-049, slip op. at 6 (Ill. Labor Relations Bd. Mar. 1, 2010) (holding that Barrington Hills lacked standing to assert the procedural due process rights of its employees). *See generally FOP/Metro. Police Dep't Labor Comm. v. D.C. Office of Police Complaints*, 64 D.C. Reg. 2470, Slip Op. No. 1609 at 3, 19, PERB Case Nos. 12-U-16 and 13-U-38 (2017) (holding that a union lacked standing to bring a complaint on behalf employees it did not represent); *FOP/Metro. Police Dep't Labor Comm. v. D.C. Office of Unified Commc'ns*, 62 D.C. Reg. 2902, Slip Op. No. 1505 at 7-8, PERB Case No. 13-U-10 (2014) (same).
[58] D.C. Official Code § 1-617.11(a).
[59] Mot. for Recons. Case Nos. 17-U-09, 17-U-21, &17-U-23 ("Motion") at 7-8.
[60] *Kerry v. Din*, 135 S. Ct. 2128, 2133-37 (2015) (plurality opinion); *Hood v. United States*, 28 A.3d 533, 565-63 (D.C. 2011).
[61] *Lyng v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers*, 485 U.S. 360, 366, (1988).
[62] *Babbit v. United Farmworkers Nat'l Union*, 442 U.S. 289, 313 (1979); *Smith v. Ark. State Highway Employees, Local 1315*, 441 U.S. 463, 465-66 (1979) (per curiam); *Griffith v. Lanier*, 521 F.3d 398, 400 (D.C. 2008) (holding that a general order of the Metropolitan Police Department negating the right engage to collective bargaining under the CMPA did not violate the First Amendment).

the District of Columbia recognized with respect to Federal Reserve employees in *Fraternal Order of Police v. Board Governors of the Federal Reserve System.*[63]

In that case the plaintiffs, a union and its president, alleged that the Federal Reserve Bank's policy on labor relations denied them "the opportunity to adjudicate their disputes before an impartial decisionmaking body" and that payment of arbitration fees required by the policy could prevent employees from exercising their rights under the policy.[64] The plaintiffs claimed that the policy thereby deprived them of the right to bargain collectively in violation of the Due Process Clause of the Fifth Amendment.[65] The court stated that since there is no constitutional right to collective bargaining, "for a protected right to bargain to exist at all for Federal Reserve Bank employees, it must be conferred by statute."[66] The court found that no statute granted Federal Reserve Bank employees or their representatives a right to bargain collectively. "Accordingly," the court held, "there is no protected right to bargain in this case and, despite the Policy's shortcomings, it presents no due process problems."[67] Similarly, the Board turns to District of Columbia statutes to ascertain whether they confer a right to bargain collectively (under the Board's auspices or otherwise) on the Corporation's employees or their representatives.

They do not. As discussed, the CMPA, which confers such a right under the auspices of the Board, does not apply to the Corporation or its employees. The Corporation Establishment Act does not confer a right to collective bargaining on anyone.

The Nurses Association admits that the employees have no right to collective bargaining under the law, but it claims one anyway: "Although it clearly states in the D.C. Code that UMC employees shall not enjoy any rights and benefits afforded by the CMPA; during these past seven years, UMC employees have exercised their right to organize and bargain under the auspices of the PERB."[68] What the employees "exercised" was not a right: they did not have a right to organize and bargain collectively under the auspices of PERB, and they did not acquire that right by purporting to exercise it. PERB's erroneous acquiescence in one or more of their actions did not create such a right. Holding that a federal agency may not create a private right of action that Congress has not authorized, the Supreme Court said, "Agencies may play the sorcerer's apprentice but not the sorcerer himself."[69]

B. Alleged Deprivation

The Nurses Association contends that without PERB the employees will no longer have a forum in which "to enforce their right to organize and bargain collectively."[70] In support of its

[63] 391 F. Supp. 2d 1 (D.D.C. 2005).
[64] *Id.* at 8.
[65] *Id.*
[66] *Id.* at 9.
[67] *Id.*
[68] Motion at 7.
[69] *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001).
[70] Motion at 8.

claim that the employees will no longer have a forum, the Nurses Association argues that the National Labor Relations Board ("NLRB") does not have jurisdiction over the Corporation.[71]

PERB takes no position on the jurisdiction of the NLRB over the Corporation. That is a question for the NLRB to decide. If the NLRB did lack jurisdiction, the Nurses Association could not claim on that basis that dismissal of the unfair labor practice cases would deprive the employees of a liberty interest in organizing and collective bargaining. Neither the Corporation Establishment Act nor dismissal of the Cases pursuant to that act prohibits employees represented by the Nurses Association from organizing and bargaining collectively.[72] They do preclude the employees from doing so under the auspices of PERB, but that is not the equivalent of a prohibition even if the NLRB lacks jurisdiction. An absence of NLRB jurisdiction does not mean that either PERB has jurisdiction or no one does. Where the NLRB lacks jurisdiction over a labor dispute, jurisdiction may be exercised by state courts[73] or by the courts of the District of Columbia, whose jurisdiction is parallel to that of state courts.[74]

The District of Columbia Superior Court is a court of general jurisdiction.[75] Its jurisdiction includes contractually mandated arbitration proceedings. Under the Revised Uniform Arbitration Act, District of Columbia courts have jurisdiction to enforce an agreement to arbitrate; to compel or stay arbitrations; to grant provisional remedies and judicial relief; and to confirm, modify, correct, or vacate an arbitration award.[76] Because the CMPA is inapplicable to the Corporation and its employees, the CMPA's preemption of the jurisdiction of the courts to hear appeals from arbitration awards[77] is inapplicable to arbitrations involving the Corporation.

Despite the inapplicability of the CMPA, the Nurses Association relies upon the court of appeals' statement that "[w]ith few exceptions, the CMPA is the exclusive remedy for a District of Columbia public employee who has a work-related complaint of any kind."[78] The Nurses Association fails to acknowledge that among the "exceptions" to the exclusivity of the CMPA's remedies are those made by sections 44-951.08 and 44-951.10. The cases cited by the Nurses Association on the limited, appellate role of the courts in matters to which the CMPA applies[79] have no bearing on matters to which the CMPA does not apply. In this regard, the Nurses Association incorrectly states, "As noted by the Court of Appeals, the CMPA was intended to be the exclusive avenue for remedies for UMC employees to resolve work-related issues such as

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[71] Motion at 8-14.
[72] To the contrary, the Corporation Establishment Act recognizes the existence and validity of collective bargaining agreements between the Corporation and its employees. D.C. Official Code §§ 44-951.04(A)(1)(c); 44-951.08(c).
[73] *Incres S.S. Co. v. Int'l Maritime Workers Union*, 372 U.S. 24 (1963); *S. Jersey Catholic Teachers Org. v. St. Teresa of the Infant Jesus Elementary Sch.*, 696 A.2d 709, 714 (N.J. 1997).
[74] *Local 31, Nat'l Ass'n of Broad. Eng'rs & Technicians v. Timberlake*, 409 A.2d 629, 632 (D.C. 1979); *Karath v. Generales*, 277 A.2d 650, 651-53 (D.C. 1971).
[75] D.C. Official Code § 11-921(a).
[76] D.C. Official Code §§ 16-4405-16-4424.
[77] D.C. Official Code § 1-605.02(6).
[78] *Robinson v. District of Columbia*, 748 A.2d 409, 411 (D.C. 2000) *quoted in* Motion at 14.
[79] *Stockard v. Moss*, 706 A.2d 561 (D.C. 1997); *District of Columbia v. Thompson*, 593 A.2d 621 (D.C. 1990).

their right to join a union and bargain collectively."[80] The Court of Appeals never made any such statement about UMC employees.

As a result of the jurisdiction of the courts, dismissal of the unfair labor practice cases will not deny the employees a forum. Nor will it effect a deprivation of the interest that the Nurses Association asserts. Any dissatisfaction with the means available to the employees for adjudicating issues related to their organizing and collective bargaining in the absence of PERB's jurisdiction is a matter to be addressed to the legislature.

The first element of a procedural due process claim is absent: the Nurses Association has failed to show a protected liberty or property interest of which a person has been deprived. The Nurses Association's claim that dismissal of the unfair labor practice cases would violate due process fails because "*no* process is due if one is not deprived of 'life, liberty, or property.'"[81]

IV. Conclusion

The Executive Director was correct in deciding that the Cases should be dismissed due to the Board's lack of jurisdiction over them. The Movants have given no reason why a different result is warranted or even possible. Nor have they cast doubt on the constitutionality of dismissing the Cases. We reject the claim that the Board will deprive the employees of due process unless it continues to exercise jurisdiction it never had in the first place. Therefore, the Motions are denied, and the Cases are dismissed.

ORDER

IT IS HEREBY ORDERED THAT:

1. PERB Case Nos. 17-U-09, 17-U-21, 17-U-23, and 17-RC-01 are consolidated.
2. The motions for reconsideration filed in the consolidated cases are denied.
3. The Board's decision and order in Opinion No. 1580 is vacated.
4. PERB Case Nos. 17-U-09, 17-U-21, 17-U-23, and 17-RC-01 are dismissed with prejudice.
5. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Charles Murphy, Members Ann Hoffman, Barbara Somson, Douglas Warshof, and Mary Anne Gibbons
Washington, D.C.
May 17, 2018

[80] Motion at 15.
[81] *Kerry v. Din*, 135 S. Ct. 2128, 2132 (2015) (plurality opinion).

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in Case Nos. 17-U-09, 17-U-21, 17-U-23, and 17-RC-01 is being transmitted to the following parties on this the 23d day of May 2018.

Walakewon Blegay
Staff Attorney **by File&ServeXpress**
D.C. Nurses Association
5100 Wisconsin Ave. NW, suite 306
Washington, D.C. 20016

Michael D. Levy
Dean S. Aqui **by File&ServeXpress**
C. Michael Hathaway
Office of Labor Relations and Collective Bargaining
441 4th Street NW, suite 820 north
Washington, D.C. 20001

Gaby L. Fraser
Director of Operations **by U.S. Mail**
National Association of Special Police and Security Officers
840 First Street NE, third floor
Washington, D.C. 20002

/s/ David S. McFadden
Attorney-Advisor