

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any formal errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD**

)	
In the Matter of:)	
)	
American Federation of State,)	
County and Municipal Employees,)	
D.C. Council 20, Local 1200)	
)	
Petitioner,)	
)	
and)	
)	
District of Columbia)	
Office of the Controller,)	PERB Case No. 96-UC-01
Division of Financial Management)	Opinion No. 503
Agency.)	
)	MOTION TO DISMISS
)	
)	

DECISION AND ORDER

On May 16, 1996, the American Federation of State, County and Municipal Employees, D.C. Council 20, Local 1200 (AFSCME), pursuant to the Comprehensive Merit Personnel Act (CMPA), D.C. Code § 1-605.2(1) and Board Rule 506, filed a Petition for Unit Clarification.^{1/} AFSCME requested that the Board determine whether or not employees classified as DS-334 Computer Specialist are properly included in a unit of employees employed by the District of Columbia Office of the Controller, Division of Financial Management (OC/DFM).^{2/} The Office of Labor Relations

^{1/} An investigation of the Petition revealed that the parties disagreed over whether or not an employee classification, DS-334 Computer Specialist, is professional or nonprofessional and thereby appropriately included in a unit of nonprofessional employees.

^{2/} The Board certified AFSCME as the exclusive bargaining representative of this unit in PERB Case No. 80-R-02,

and Collective Bargaining (OLRCB) filed a response to the Petition but later informed the Board that the Office of the Chief Financial Officer of the District of Columbia (OCFO) would henceforth respond for OC/DFM. On October 15, 1996, a Motion to Dismiss For Lack of Jurisdiction and supporting Memorandum of Law was filed by counsel for the OCFO. AFSCME filed a response on November 14, 1996.^{3/} On November 25, 1996, the Movant filed a request to submit a reply to AFSCME's response. That request is hereby granted.

The issue presented by the Motion is whether the Financial Responsibility and Management Assistance Act (FRMAA) and the Omnibus Consolidated Rescissions and Appropriations Act of 1996 and 1997 (OCRAA) effectively abrogate employees' rights under Subchapter XVIII, Labor-Management Relations of the CMPA. For the reasons that follow, we find that these Acts do not.

The FRMAA transferred to the Chief Financial Officer (CFO) all the authority of the Mayor with respect to financial

Certification No. 4.

^{3/} The Petitioner makes two preliminary contentions: (1) that the CFO's Motion is untimely filed and (2) the CFO waived any objection to the Board's jurisdiction over this matter. With respect to the former contention, AFSCME argues that the basis of the CFO's motion to dismiss for lack of jurisdiction existed at the time the Petition was filed in May 1996. However, the CFO did not file its motion to dismiss until October 1996, 5 months later. AFSCME argues that consistent with Board Rule 520.7 and principles of due process and speedy resolution of disputes, the Motion should be denied as untimely filed. Board Rule 520.7 sets a time limit for filing an initial answer to an unfair labor practice complaint. That Rule simply does not apply to this situation. Nothing in Board Rule 553, concerning motions, require that motions of any nature be filed within a certain time period to be considered by the Board. Absent notice of such a forfeiture pursuant to Board Rules or the CMPA, laches or other equity arguments do not appear to be sufficient for finding a Motion challenging the Board's jurisdiction untimely that is filed prior to any disposition in this matter on the merits.

AFSCME's waiver argument is based on the absence of any challenge by the Office of Labor Relations and Collective Bargaining (OLRCB) to the Board's jurisdiction in its Response to the Petition. No basis exists for finding the decision by OLRCB not to contest the jurisdiction of the Board to be a waiver of the CFO's right to file a motion contesting this issue. OLRCB is the Mayor's labor representative. As is discussed above, while the CFO and the Mayor have shared authority of a portion of the executive office of the Mayor, they are not one in the same. Therefore, no basis exists for finding the actions of one to constitute a waiver by the other.

Decision and Order

PERB Case No. 96-UC-01

Page 3

management matters. Specifically, this included the functions and personnel of the Controller of the District of Columbia, the Office of the Budget and the OC/DFM. (Exh. A.) The OCRAA transferred the personnel authority for all budget, accounting, and financial management personnel in the executive branch from the Mayor to the OCFO. (Exh. B.) The CFO's contention that employees of these affected agencies are no longer covered by the CMPA, in the main, turns on three arguments. First, that under these Acts, employees of these agencies have been rendered at-will employees, a status that is inconsistent with both bargaining and non-bargaining unit employees under the CMPA. The second argument is based on the preamble of Section 152 which gives the CFO its powers "[n]otwithstanding any other provision of law, for the fiscal years ending September 30, 1996, and September 30, 1997... ." The CFO cites a letter he received from members of two Congressional Subcommittees in which the CFO was informed that "Section 152 [of the OCRAA of 1996] further relieves the CFO from the obligation to follow any and all regulations, including the District of Columbia Comprehensive Merit Personnel Act (CMPA), as codified in D.C. Code, sec. 1-601, et seq." (EXH. D). The CFO contends that this interpretation of the OCRAA is implicit in the preamble of Section 152. Finally, the OCFO makes the general contention that compliance with the CMPA is inconsistent with achieving the CFO's objectives under the OCRAA and FRMAA and therefore, the CFO's enabling legislation was intended to preempt such inconsistent preexisting laws.

As the Petitioner notes, the subcommittee letter on which the CFO relies is post-enactment of both the OCRAA or the FRMAA. Under the CFO's interpretation of Sec. 152 of the OCRAA, the Act can serve to render inapplicable to the CFO any law or authority with the exception of the laws creating the OCFO.^{4/} This sweeping interpretation is neither expressly nor implicitly supported by the language of the OCRAA or FRMAA. No provision of the OCRAA or FRMAA categorically extinguishes rights accorded by

^{4/} Post enactment comments or statements by legislators interpreting the meaning of Federal legislation have been held to have little weight or value. See, Pittston Coal Group v. Sebben, 488 U.S. 105 (1988) and Clarke v. Securities Industries Association, 479 U.S. 388 (1987). The Petitioner suggests that a more reasonable interpretation of this provision is that the CFO is accorded all the powers expressly listed under Section 152 of the OCRAA of 1996 "notwithstanding any other provision of law" that may be contrary to according such authority to the CFO.

Decision and Order

PERB Case No. 96-UC-01

Page 4

the CMPA to employees employed by covered agencies.^{5/} Given the general fiscal purpose of the legislation creating the CFO and the specific protections and coverages under the CMPA, such a sweeping preemption cannot be construed as the ordinary meaning of the Sec. 152 without some support expressly provided in the legislation itself.^{6/}

The Board has recognized its lack of jurisdiction under the CMPA to consider a cause of action when the matter has been expressly placed in the jurisdictional authority of another forum. Gina Douglass, et al. v. Mayor of the District of Columbia and AFSCME, D.C. Council 20, Locals 1033, et al., 39 DCR 9621,

^{5/} See, e.g., Morton v. Mancari, 417 U.S. 535 (1994) (where there is no clear intention otherwise, a specific statute, e.g., CMPA, will not be controlled or nullified by a general one, e.g., OCRAA, regardless of the priority of the enactment); TVA v. Hill, 437 U.S. 153 (1978) (the policy disfavoring repeals of statutes by implication applies with even greater force when the claimed repeal rests solely on an appropriations act; no exception accorded the subsequent comments of committee members of the act); and United States v. Fausto, 484 U.S. 439 (1988) (repeals of statutes by implication are strongly disfavored, so that a later statute will not be held to have implicitly repealed an earlier one unless there is a clear repugnancy between the two). The Petitioner notes that Congress specifically amended the District of Columbia's Home Rule Act, where appropriate, to accommodate the objectives of FRMAA. In the subsequently passed OCRAA for FY 96 and 97, Congress made additional amendments to the Home Rule Act as well as the CMPA; however, no amendments were made to the labor management subchapter. The Petitioner further notes that the intent of Congress not to abrogate the general authority of the Board over these employees is borne out by specific provisions removing from the obligation to bargain certain established reduction if force procedures or for Board of Education employees. In view of such express provision, the absence of such affirmative and specific provisions affecting the rights of the instant employees under any sections of the OCRAA in general or sections concerning the OCFO specifically suggest an intent not to remove those employees not expressly removed from the coverage of this portion of the CMPA.

^{6/} See, American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) (in all cases involving statutory construction of Federal legislation, a court must start with the actual language employed by Congress, and it should be assumed that the legislative purpose is expressed by the ordinary meaning of the words used).

Decision and Order

PERB Case No. 96-UC-01

Page 5

Slip Op. No. 315, PERB Case No. 92-U-03 (1992). The Board has also recognized the preemption of statutory rights otherwise accorded parties under the CMPA by later statutes and related laws that expressly supersede or directly conflict with the CMPA. See, e.g., AFSCME, D.C. Council 20, et al. v. Government of the District of Columbia, et al., 43 DCR 1148, Slip Op. No. 343, PERB Case No. 92-U-24 (1993). Consistent with this statutory construction, specific provisions of the OCRAA and FRMAA may very well preempt specific provisions of the CMPA, but only to the extent that there is an actual and express conflict. Therefore, any implied repeal of preexisting employee rights afforded under the CMPA by cited authority accorded the CFO under the FRMAA, e.g., to terminate employees at will, will be narrowly construed as limited to the rights affected by that expressed authority.

The CFO does not exist outside the context of the District of Columbia Government but rather "within the executive branch of the government of the District of Columbia." FRMAA, Sec. 302(a). Subject to the approval of the Financial Control Board (FCB), the Mayor is given the authority to appoint and remove the CFO. Id. at Sec. 302(b). In this regard, the authority accorded the CFO is derived from the office of the Mayor with respect to the covered agencies. The FRMAA and OCRAA provide certain additional express powers not possessed by the Mayor under the CMPA or other preexisting related law. However, notwithstanding all the express authority accorded the CFO, nowhere under these Acts is the CFO relieved of any of the obligations the Mayor has with respect to collective bargaining.

Although in certain instances the CFO's additional powers may supersede provisions of the CMPA, we cannot find that the CFO's authority implicitly removes these employees from the entire coverage of the CMPA. We do not find, nor has the OCFO demonstrated that such a reading is compelled to permit the CFO to achieve his objectives under the legislation in question.^{7/}

If there was meant to be this kind of broad exclusion of these bargaining unit employees from their basic rights under the CMPA, it would be clearly stated in the FRMAA or OCRAAs or in the

^{7/} The existence of negotiated collective bargaining agreements is contemplated under the FRMAA under Sec. 203(b) where the FCB is accorded the authority to determine whether or not the Mayor may enter into the agreement. This approval process affords the CFO the flexibility to exercise its authority under the FRMAA in concert with collective bargaining under the CMPA.

legislative history.^{8/} Absent such explicit and specific language in the legislation, we simply cannot adopt by implication the interpretation the OCFO would have us make. Therefore, we find the Board's authority to establish appropriate collective bargaining units and determine whether a disputed employee classification is a bargaining unit position remains intact notwithstanding the authority of the CFO under the OCRAA and FRMAA.^{9/}

^{8/} Such a fundamental affront to the Home Rule Charter would run contrary to an expressed purpose of the FRMAA which contemplated "[a] comprehensive approach to fiscal, management, and structural problems ... which preserves home rule for the citizens of the District of Columbia." FRMAA, § 2(a)(5) (emphasis added.).

^{9/} FRMAA Sec. 105 provides that "any action otherwise arising out of this Act, in whole or part, shall be brought in the U.S. District Court. ..." The CFO contends that this provision vests jurisdiction of this matter in the District Court. The instant "action" is the determination of the scope of a collective bargaining unit, a matter that does not arise out of the FRMAA. The CFO's challenge to the Board's jurisdiction to make this determination with respect to employees under its charge is an ancillary issue and not the action before us. As the Petitioner observes, under this reasoning, any action could be made an action under the FRMAA if the CFO is involved.

The Petitioner also makes the argument that, whether or not the Mayor no longer has the authority to bargain with representatives of these employees, the CFO has inherited that obligation from the Mayor when he inherited the personnel authority over these employees from the Mayor. As previously discussed, since the Acts in question neither expressly nor categorically remove these employees from the labor management program under the CMPA, the CFO, with limited exceptions, acquired the attending obligations its role assumed with respect to these employees under the CMPA. In any event, the labor management program under the CMPA appears substantially intact. Who as between the CFO and Mayor will act on behalf of DFR with respect to meeting these obligations is an issue as between the CFO and the Mayor. See, e.g., American Federation of Government Employees, Local 2725, AFL-CIO v. D.C. Housing Authority, Slip Op. 492, PERB Case No. 95-U-11 (1996) (Similar contentions were made by the court appointed receiver of the D.C. Housing Authority after personnel management authority was accorded it.).

With respect to CFO's contention that the Petitioner should expressly join the OCFO in this proceeding as a necessary party before the Petition can be further processed, we find this issue a moot point. By its filing of the instant Motion to Dismiss, the CFO is deemed to have intervened in this proceeding. Moreover, in view of our finding that the Board continues to have jurisdiction over these employees and the OC/DFM with respect to the labor-management relations program under the CMPA, the Petitioner's service of OC/DFM is sufficient due process for purposes of rendering a determination on this issues presented. (See n. 6.)

ORDER

IT IS HEREBY ORDERED THAT:

1. Consistent with and for the reasons discussed in this Opinion, pursuant to our authority under Subchapter XVIII, Labor-Management Relations of the Comprehensive Merit Personnel Act, the Public Employee Relations Board maintains its jurisdiction over employees of the District of Columbia government, the agencies that employ them and the labor organizations that represent them with respect to labor-management relations under the CMPA, notwithstanding the authority and objectives of the Office of the Chief Financial Officer under the Financial Responsibility and Management Assistance Act and the Omnibus Consolidated Rescissions and Appropriations Act of 1996 and 1997.
2. In view of paragraph 1, the Motion to Dismiss for Lack of Jurisdiction filed by the Office of the Chief Financial Officer (OCFO) is denied.
3. The Petition for Unit Modification is referred, forthwith, to a Hearing Examiner to develop a complete record and to render a Report and Recommendation with respect to the issue presented.
4. The OCFO shall be served with all official notices, correspondence and other filings and issuances in this proceeding as an interested party.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

December 12, 1996