State of Maryland
State Higher Education Labor Relations Board

In the matter of: American Federation of State, County and Municipal Employees, Petitioner, and Baltimore City Community College, Institution.	SHELRB PDR No. 2004-01 DECLARATORY RULING No. 1

DECLARATORY RULING

I. Facts Set Forth in the Petition

The American Federation of State, County and Municipal Employees ("AFSCME") has petitioned the State Higher Education Labor Relations Board ("Board") for a declaratory ruling under the Maryland Code at Section/Regulation 14.30.04.12. Specifically, AFSCME seeks a declaratory ruling defining the obligation and authority of Baltimore City Community College ("BCCC")under the Collective Bargaining Statute (hereinafter "the statute" or "Title 3 of the State Personnel and Pensions (SPP) Article") to engage in collective bargaining and enter into a memorandum of understanding with respect to the terms and conditions of employment of all of its collective bargaining employees. The Petitioner, AFSCME, is the certified exclusive representative of employees in all three of BCCC's collective bargaining units.[1]/ At the time of this filing, AFSCME and BCCC were in the midst of negotiating their first memorandum of understanding for each of these bargaining units. The issues that are the subject of the requested declaratory ruling are not currently the subject of a formal Board investigation or

[1]/ AFSCME was duly elected as exclusive representative for all three units as certified by the Board in Case Nos. C 2001-03, -04, and -05 on December 5, 2001. Baltimore City Community College (BCCC) is one of several State institutions of higher education covered by the Collective Bargaining Statute. *See* State Personnel and Pensions Article (SPP), Title 3, §3-102(a)(5).

complaint.[2]/ The Board directed oral arguments on the issues presented by the Petition. The oral arguments were presented to the Board on May 27, 2004.

II. Background

The Impact of Personnel Authorities under the Collective Bargaining Statute

Pursuant to §16-510(b) of the Education Article ("Ed. Art."), BCCC is given independent personnel authority with respect to its officers, faculty, and administrative employees. However, BCCC's independent personnel authority is limited under the statute and does not extend to all other of its appointed employees.[3]/ Pursuant to Section 16-510(a), Ed. Art., all other BCCC-appointed employees are "skilled service employees." Skilled service employees are under the personnel authority and attending personnel system of the Executive Branch (Governor's office) of State government. The personnel system of the Executive Branch is the State Personnel Management System (SPMS).[4]/ The SPMS is administered by the Secretary of the Department of Budget and Management (DBM or Secretary). Consequently, while BCCC's skilled service employees do in fact work for BCCC, their terms and conditions of employment are not subject to BCCC's independent personnel authority but rather to the laws and regulations applicable to the terms and conditions of employment of State employees covered under the SPMS personnel system administered by the Secretary of DBM. BCCC's collective bargaining unit employees comprise both *skilled service* employees under the SPMS personnel authority and

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[2]/ Any issue or matter which is the subject of a *formal* complaint or investigation is outside the scope of a declaratory ruling. A petition for declaratory relief is filed solely for the purpose of determining the rights of the parties in the event of a controversy or uncertainty as to applicable law.

[3]/ Title 1, Subtitle 1 of the State Personnel and Pension Article, §1-101(a)(b), defines appointing authority as "an individual or unit of government that has the power to make appointments and terminate employment." Personnel authority accords the individual or State unit with universal aggregate authority to establish an entire personnel system for various classifications of employees with respect to wages, hours and other terms and conditions of employments. *See, e.g.*, SPP, §6-102. An individual or State unit of government with personnel authority has authority over appointing authorities whose appointed employees are under its personnel system. *See*, SPP, §6-103.

[4]/ Except as provided otherwise by law, the SPMS is the governing personnel authority system for all employees within the Executive Branch of State Government. *See*, SPP, §2-202.

administrative employees under BCCC's independent personnel authority.[5]/

Even though BCCC's collective bargaining employees are covered under two different personnel authorities and systems, the statute establishes appropriate collective bargaining units at covered State higher educations institutions (including BCCC) without regard to which personnel authority or systems cover them. The statute defines appropriate bargaining units at higher education institution as follows:

(1) "all eligible non-exempt employees as described in the federal Fair Labor Standards Act;
(2) "all eligible exempt employees as described in the federal Fair Labor Standards Act", and
(3) "all eligible sworn police officers." [Emphasis added.]

The BCCC Anomaly

The defined scope of these statutory bargaining units does not necessarily limit these units to employees under the exclusive personnel authority of BCCC. Thus, (1) 90% of BCCC's nonexempt unit employees are skilled service employees and are therefore also subject to the personnel authority of the Secretary of DBM while the other 10% remain solely under BCCC's independent personnel authority; (2) BCCC's sworn police officer unit is composed entirely of skilled service employees under the personnel authority of the Secretary; and, (3) all of BCCC's exempt unit employees fall under BCCC's personnel authority. As stated above, this duality of subordination to both the Collective Bargaining Statute and the SPMS is an anomaly occurring for most nonexempt and all sworn police officers only at BCCC. Thus is created an anomaly for BCCC's collective bargaining units that comprise employees who are covered by BCCC's independent personnel authority and the SPMS. This situation does not occur for employees of any other State higher education institution.

III. Discussion

Basis of the Petition

AFSCME requests a declaratory ruling on the extent of

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[5]/ Pursuant to §3-102, SPP, the collective bargaining provisions of the statute are not applicable to faculty, chief administrators, and comparable positions.

BCCC's obligation and authority under the statute to negotiate and execute a memorandum of understanding applicable to BCCC's skilled service bargaining unit employees (in BCCC's nonexempt and sworn police officer units) in view of SPP, §3-501(f)(2). SPP, §3-501(f)(2) provides as follows:

> (f) (2) The terms of a memorandum of understanding executed by a president of a system institution or the governing board of Morgan State University, St. Mary's College of Maryland, or Baltimore City Community College, or their respective designees, and the exclusive representative of a bargaining unit for employees of a State institution of higher education are not applicable to skilled service or professional service employees in the State Personnel Management System. [Emphasis added.]

SPP, §3-501(f)(2) prohibits a state institution from applying the terms of any negotiated MOU to employees not under its personnel authority. Section 3-501(f)(2) and its counterpart §3-501(f)(1)[6]/ is a clear recognition under the statute that the authority to apply the negotiated terms of any memorandum of understanding (MOU) to covered employees lies with the entity having personnel authority over the employees. Typically, under the State personnel systems, the entity negotiating and executing an MOU also has personnel authority over all its bargaining unit employees covered by the MOU and, therefore, the State entity is not confronted by the prohibitions of Section 3-501(f)(1) and (2), nor are these prohibitions ordinarily at issue for covered State institutions under the statute. However, unlike all other covered institutions, due to BCCC's lack of independent personnel

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[6]/ The Collective Bargaining Statute has a provision corresponding to SPP, §3-501(f)(2) for MOUs governing eligible employees under the Governor's personnel authority, i.e., SPP, §3-501(f)(1). Section 3-501(f)(1) provides as follows:

> (f)(1) The terms of a memorandum of understanding executed by the Governor or the Governor's designee and an exclusive representative of a bargaining unit for skilled service or professional service employees in the State Personnel Management System are not applicable to employees of a State institution of higher education.

The references in SPP, §3-501(f)(1), "not applicable to employees of the State institution of higher education," and in SPP, §3-501(f)(2), "not applicable to skilled service or professional service employees in the State Personnel Management System [SPMS]," refer, respectively, to: (1) employees under the State higher education institutions' independent personnel authorities; and (2) employees under the State's personnel authority, i.e., SPMS. In this regard, the Governor can execute an MOU with respect to terms that would apply to employees under the Governor's personnel authority, e.g., BCCC's skilled service employees, although the employees work for or were appointed by BCCC, a State institution of higher education.

authority over all its skilled service bargaining unit employees, Section 3-501(f)(2) *effectively limits* BCCC's collective bargaining obligations and authority solely to *negotiating* the MOU with respect to these bargaining unit employees.[7]/ This limitation therefore neither obliges nor permits BCCC, solely on its own authority, to apply, in the context of an enforceable MOU or contract, to its skilled service employees the terms of any MOU it negotiates. Again, this collective bargaining anomaly under the statute is unique to BCCC among all covered institutions.

BCCC's Capacity and Duty to Negotiate under the Collective Bargaining Statute

Notwithstanding SPP, §3-501(f)(1) and (2), we emphasize that BCCC's capacity to negotiate and duty to bargain in good faith under the statute remain no different than that of all other covered institutions of higher education. This obligation extends to negotiating over the wages, hours and other terms and conditions of employment of all of an institution's bargaining unit employees defined under SPP, §3-403(d)(3) who have elected to do so.[8]/ A narrower interpretation of SPP, §3-501(f)(1) and (2) would result in the disenfranchisement of skilled service employees at BCCC from basic collective bargaining rights under the statute. Any such interpretation engendering such a result would be not only strained but indeed contrary to the clear mandate under the statute that all covered State institutions of higher education must bargain in good faith over the negotiable working conditions of all of their represented bargaining unit employees.[9]/

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[7]/ We note that our reference to BCCC in the context of its bargaining obligation is a reference to its bargaining obligation as exercised through BCCC's governing board pursuant to SPP, §3-501.

[8]/ During oral arguments BCCC appeared to be in agreement with our determination on this issue as presented by the Petitioner regarding BCCC's statutory collective bargaining obligation under the statute as to all its bargaining unit employees.

[9]/ Both AFSCME and BCCC offered evidence of legislative history in the form of a letter from then Governor Glendening (who had introduced the Collective Bargaining Legislation) to the General Assembly. In the letter Governing Glendening states, "The Board of Trustees will be solely responsible for collective bargaining with BCCC employees and such employees will not be covered under collective bargaining in the Executive Branch." (BCCC Exh. 5) If the Board accords any weight to this letter, it would be as further support for our interpretation of the statute with respect to BCCC's authority to engage in collective bargaining over the working conditions of all its appointed employees, including its skilled service employees. The letter offers no insight on issues relating to the recognized role of personnel authorities under the statute with respect to such related matters as the execution and application of MOUs covering employees under their respective personnel system and authority.

Collective Bargaining by BCCC under the Collective Bargaining Statute

We turn now to the impact of BCCC's unique circumstance on the practicalities of BCCC's collective bargaining obligations under the statute. As we stated, the parameters governing BCCC's statutory obligation to bargain in good faith over wages, hours, and other terms and conditions of employment of its skilled service employees are no different than those governing the collective bargaining obligation of all other covered institutions of higher education. BCCC's obligation to bargain with respect to such matters is thus also subject to the same mandatory prohibited and discretionary qualifications under SPP, §3-502.

In practice, BCCC's engagement in the collective bargaining process is no different than that of other covered institutions, but there is one significant exception arising under SPP, §3-502(c). That is, pursuant to SPP, §3-502(c)(1), as a *State employer* BCCC is not required to (but can) negotiate over any matter inconsistent with applicable law.[10]/ Should BCCC elect to negotiate over any matter that is inconsistent with applicable law, however, pursuant to SPP, §3-502(c)(2), any agreement over the matter could not become effective unless the inconsistent applicable law is amended by the General Assembly.

We have learned from both the Petitioner and BCCC of an understandable desire that certain working conditions, where appropriate, be uniform for all BCCC employees within and across bargaining unit lines. However, unlike other institutions, BCCC must consider applicable laws governing *two personnel systems* that may affect the same term or condition of employment differently based on the personnel system covering the bargaining unit employee. Therefore, any effort by BCCC to negotiate uniform terms and conditions of employment is affected by the fact that BCCC would necessarily have to (1) be cognizant of applicable laws governing the SPMS personnel system as well

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[10] / Section 502(c) provides as follows:

Notwithstanding subsection (a) of this section, the representative of the State, a system institution, Morgan State University St. Mary's College of Maryland, and Baltimore City Community College:

(1) shall not be required to negotiate over any matter that is inconsistent with applicable law; and
(2) may negotiate and reach agreement with regard to any such matter only if it is understood that the agreement with respect to such matter cannot become effective unless the applicable law is amended by the General Assembly.

as its own; and, (2) pursuant to SPP, §3-502(c)(2), determine which matters it will elect to negotiate where the proposed matter requested for negotiations is inconsistent with personnel-system-specific law(s) applicable to the term or condition of employment of the affected bargaining unit employees.

Any MOU containing agreed matters that BCCC has elected to negotiate pursuant to SPP, §3-502(c)(2) would not become effective until any inconsistent applicable law(s) are amended by the General Assembly. In this regard, we note that the restriction which the statute at SPP, §3-501(f)(2) places on an employer's authority to apply the terms of an MOU that it has executed to employees not under its personnel authority is, itself, an inconsistent applicable law. As discussed, it precludes BCCC from applying the negotiated and agreed upon terms of its executed MOU to its skilled service employees.[11]/ Therefore, before the terms of an MOU executed by BCCC could be made applicable to BCCC's skilled service employees, BCCC would have to obtain the necessary legislative amendment(s) to laws, e.g., the statute, that currently preclude it from doing so.[12]/

In the alternative, we note that the prohibition of SPP §3-501(f)(2) on State higher education institutions' applying the terms of an MOU to skilled service and professional service employees in the SPMS (the Governor's personnel authority) is limited to an MOU executed by the institution. Therefore, the prohibitions of SPP, §3-50(f)(2) can be avoided if, pursuant to SPP, §3-501(d)(1)(i) and 601(a)(2)(i), the Governor's Office authorizes BCCC to be its designee for purposes of executing an MOU that includes skilled service employees under the Governor's personnel authority, the SPMS. Such an MOU must, nevertheless, subsequently be ratified by the Governor pursuant to SPP, §3-601(c). We note, however, that good faith bargaining requires that representatives engaged in the collective bargaining process have the authority to reach agreement on behalf of their principal regarding negotiated matters. Therefore, as a practical matter, if under this scenario BCCC is accorded the

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[11]/ During oral argument, the Petitioner contended that, under the statute, BCCC possessed the authority to execute an MOU whose terms covered its skilled service employees. As discussed in the text, we agree that BCCC could execute such an MOU; however, the MOU could not be made applicable to its skilled service employees unless, pursuant to SPP §3-502(c)(2), inconsistent applicable laws are amended, e.g., SPP, §3-501(f)(2) and Ed. Art., §16-510. *See*, fn 6.

[12]/ Both BCCC and the Petitioner have recognized that BCCC could avoid triggering the prohibitions of SPP, §3-501(f)(2) if the General Assembly amended Ed. Art.,§16-510 to extend BCCC's independent personnel authority to all its appointed employees or, in the alternative, remove BCCC's skilled service employees from the SPMS.

authority, as the governor's designee, to execute the MOU, that authority should be extended to the ability to agree to negotiated matters during the collective bargaining process. This element also could be met by having an authorized representative of the Governor (e.g., a representative of the DBM Secretary) participate as part of BCCC's collective bargaining team.

IV. Conclusion.

The collective bargaining statute clearly accords all covered institutions the authority and duty to bargain with respect to all employees in each of their three statutorily established collective bargaining units. However, all of the covered institutions other than BCCC have comprehensive personnel authority and a single personnel system covering their employees and are unencumbered by the applicable laws of two different personnel systems affecting the same terms and conditions of employment differently for their bargaining unit employees. Therefore, the Petitioner or other exclusive bargaining representatives of collective bargaining units at all other covered State institutions do not have to wrestle with the anomaly that encumbers BCCC. The required legislative step in the collective bargaining process for employees in BCCC's non-exempt and sworn police officers bargaining units is not caused by any inherent conflict in the statute but rather by an apparently deliberate intent by the General Assembly to maintain dual personnel systems at BCCC. In any event, as discussed above, the statute provides a means of addressing the state of affairs at BCCC with respect to executing both mandatory and permissive statutory collective bargaining obligations and objectives.

BY THE STATE HIGHER EDUCATION LABOR RELATIONS BOARD
Annapolis, MD
Issued on June 25, 2004

Karl K. Pence

Karl K. Pence, Executive Director on behalf of Jamin B. Raskin, Chair, SHELRB

Appeal Rights

Any party aggrieved by this action of the Board may seek review in accordance with Title 10 of the State Government Article, Annotated Code of Maryland, Section 10-305 and MD R CIR CT Rule 7-201 et seq.