

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

LEGAL COUNSEL DIVISION



MEMORANDUM

TO: Irvin B. Nathan
Attorney General for the District of Columbia

FROM: Janet M. Robins *JMR*
Deputy Attorney General
Legal Counsel Division

DATE: February 11, 2014

SUBJECT: Does BEGA Have Jurisdiction over allegations that OAH Employees Violated the District's Conflict of Interest Statute or its Ethics Rules? (AL-14-065)

This responds to your request that this Office examine whether the Board of Ethics and Government Accountability ("BEGA") has jurisdiction over employees of the Office of Administrative Hearings ("OAH"). BEGA is authorized to enforce a Code of Conduct, which includes provisions in the District's Code and regulations that apply to all District employees, including those who work for OAH. Nothing in BEGA's enabling statute exempts OAH from BEGA's jurisdiction. Nothing in OAH's enabling statute exempts OAH from BEGA's jurisdiction. Finally, the fact that a bill was recently introduced in the Council stating that one of its purposes is to clarify that BEGA has jurisdiction over independent agencies does not support the argument that OAH employees are exempt from BEGA's jurisdiction. For these reasons, we conclude that BEGA does have jurisdiction over OAH employees.

BEGA's Enabling Statute

Under the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Act of 2011 ("Ethics Act"),¹ BEGA was established in part to administer and enforce the "Code of Conduct." BEGA's Director is authorized to investigate possible violations of the Code of Conduct,² and BEGA is authorized, after a hearing regarding a violation, to exercise its enforcement authority or dismiss the action.³

¹ Effective April 27, 2012 (D.C. Law 19-124, D.C. Official Code § 1-1162.02 (2012 Repl. and 2013 Supp.)).

² D.C. Official Code § 1-1162.12 (2012 Repl.).

³ *Id.*, §§ 1-1162.14 and 1-1162.15.

“Code of Conduct” is defined to include various ethics provisions in the D.C. Official Code and Municipal Regulations. The two cited in the Notice of Violation issued on February 6, 2014 by BEGA against employees of OAH are: (1) Chapter 18 of Title 6B of the District of Columbia Municipal Regulations (the “Ethics Rules”); and (2) Section 223 of the Ethics Act,⁴ the “conflict of interest provision.”⁵ BEGA’s authority to enforce each of these is discussed below.

BEGA’s Authority to Enforce the Ethics rules

BEGA is authorized to enforce the Code of Conduct. Nothing in the Ethics Act limits BEGA’s enforcement authority to violations by some employees but not others. Moreover, the Committee Report on the Government Ethics Act noted that, “[t]his bill will ensure that *all* employees will be subject to the Merit Personnel Act and subject to enforcement by the new Board of Ethics and Government Accountability. The hope is that uniform applicability and common enforcement will create a measure of certainty and close a loophole in the law.”⁶ Although the Committee Report does not refer to OAH employees, the Council’s use of the phrase “all employees” reflects the Council’s intention that BEGA’s enforcement authority would extend to all District employees, including those who work for OAH.

Turning specifically to the Ethics Rules included in the Code of Conduct, these rules apply to all District government employees, including OAH employees. The rules apply to “employees” and define “employee” as “[a]n individual employed by the District of Columbia government and subject to [the Comprehensive Merit Personnel Act⁷ (“CMPA”)].⁸ The CMPA applies to “all employees of the District government” except those who are specifically exempted.⁹ The CMPA defines “employee” to mean, except when specifically modified, “an individual who performs a function of the District government and who receives compensation for the performance of such services.”¹⁰ In addition, the CMPA directs the Mayor to “issue rules and regulations governing the ethical conduct of *all* District employees.”¹¹ Read together, these provisions direct the Mayor to issue ethics rules applicable to all District employees, including OAH employees, and he did so. Those rules were incorporated into the Code of Conduct, which is enforced by BEGA. In short, the CMPA applies to OAH employees, the CMPA required the Mayor to issue rules governing the ethical conduct of all District government employees (which includes employees of OAH), and those rules apply to OAH employees. Those rules were incorporated in the Code of Conduct, which is enforced by BEGA. Nothing in the Ethics Act suggests that while the rules apply to all employees, BEGA’s enforcement authority to enforce them is somehow limited only to certain covered employees, but not others.

⁴ D.C. Official Code § 1-1162.23 (2012 Repl.).

⁵ See *id.*, § 1-1601.01(7)(E) and (F) (2012 Repl.), which defines the Code of Conduct to include these provisions.

⁶ Report of the Council of the District of Columbia Committee on Government Operations on Bill 19-511, the Board of Ethics and Government Accountability Ethics Establishment and Comprehensive Ethics Reform Act of 2011, December 5, 2011 (“Committee Report”), 21-22.

⁷ Effective March 3, 1979 (D.C. Law 2-139; D.C. Code § 1-601.01 *et seq.* (2012 Repl. and 2013 Supp.)).

⁸ D.C. Official Code § 1-603.01(7) (2012 Repl.).

⁹ *Id.*, § 1-602.01 (2012 Repl.).

¹⁰ *Id.*, § 1-603.01(7).

¹¹ *Id.*, § 1-618.01(a) (2012 Repl.) (emphasis added).

BEGA's Authority to Enforce the Conflict of Interest Statute

The conflict of interest provision is included in the Code of Conduct.¹² It was enacted as part of the Ethics Act and provides in part that, “[n]o *employee* shall use his or her official position or title, or personally and substantially participate” in any government decision “that the *employee* knows is likely to have a direct and predictable effect on the *employee*’s financial interests or the financial interests of a person closely affiliated with the *employee*.”¹³ The Ethics Act defines “employee” as, “unless otherwise apparent from the context, a person who performs a function of the District government and who receives compensation for the performance of such services, or a member of a District board or commission, whether or not for compensation.”¹⁴ The Ethics Act authorizes BEGA to enforce the Code of Conduct, the Code of Code imposes certain conflict of interest requirements on employees, including OAH employees. Accordingly, BEGA is authorized to enforce the conflict of interest requirements against OAH employees.

OAH's Status as an “Independent Agency Within the Executive Branch” Does Not Deprive BEGA of Jurisdiction

Nothing in the OAH enabling statute suggests that OAH is exempt from the CMPA, the Ethics Rules, or BEGA’s jurisdiction. OAH’s enabling statute states that OAH “is established as an independent agency within the executive branch of the District of Columbia government in the form and manner prescribed by this chapter.”¹⁵ We have not identified any legislative provision or decision suggesting that this designation, by itself, exempts OAH from BEGA’s jurisdiction. There are two provisions in OAH’s enabling statute that might be raised by one arguing that BEGA does not have jurisdiction over OAH employees, but they are not persuasive.

The first is a provision that the Council enacted when OAH was established in 2002, stating that OAH was subject to several District laws (related to procurement, small and local business preferences, and the role of the Office of the Chief Technology Officer).¹⁶ Although the OAH statute does not specifically state that OAH is subject to the Government Ethics Act, that omission is not significant. We understand that courts have, in some instances, held that where a statute includes a list of items, that list is exhaustive, under the canon of statutory interpretation referred to as “*expressio unius est exclusio alterius*” (literally, “the expression of one thing is the exclusion of the other”). However, that canon is not dispositive here. First and foremost, it is simply an aid in statutory construction, not a rule of law.¹⁷ The Supreme Court has held that this canon may be used where a statute lists items in circumstances “supporting a sensible inference

¹² D.C. Official Code § 1-1161.01(7)(F).

¹³ *Id.*, § 1-1162.23(a) (emphasis added).

¹⁴ *Id.*, § 1-1161.01(18).

¹⁵ Office of Administrative Hearings Establishment Act of 2001, effective Mar. 6, 2002 (D.C. Law 14-76; D.C. Code § 2-1831.01 *et seq.* (2012 Repl.)).

¹⁶ *Id.*, § 2-1831.02 (e).

¹⁷ *Howard Univ. Hosp. v. District of Columbia Dep’t of Emp’t Servs.*, 52 A.2d 168, 175 (D.C. 2008) (quoting *Neuberger v. Comm’r of Internal Revenue*, 311 U.S. 83, 88 (1940)).

that the term left out must have been meant to be excluded.”¹⁸ Here, the Council enacted the OAH statute well before enactment of the Government Ethics Act. Therefore, no inference can be drawn from the fact that the OAH enabling statute does not refer to BEGA.¹⁹ When the Government Ethics Act was enacted, it authorized BEGA to enforce provisions in the Code of Conduct that apply to all District employees. Therefore, there was no need to go back and amend statutes applicable to OAH or any other agency to specify that their employees were subject to BEGA’s jurisdiction.

We are aware of one apparently contrary local case, but it can be distinguished. When Congress created the Financial Responsibility and Management Authority (“Control Board”), it provided that the Control Board was subject to three District laws (the open meetings law, the Freedom of Information Act, and the then in effect ethics act). Later, the Control Board acquired title to an apartment building, and sold it. Several tenants argued that the Control Board failed to give them a right of first refusal to purchase the property, as required in District law. The court cited the *expressio unius* canon and held that the law giving tenants a right of first refusal did not apply to the Control Board.²⁰ It noted that when Congress created the Control Board, Congress intended that the Board be “unfettered by certain regulatory dictates.”²¹ There is no evidence, however, that the Council intended for OAH to be “unfettered” by the ethics laws. In addition, although the court did not rely on this point, the right of first refusal law, by its terms, applied to “owners,” and defined that word as “an individual, corporation, association, joint venture, business entity and its respective agents, who hold title to the housing accommodation unit or cooperative share.”²² Therefore, the Control Board was not an owner under the law that the plaintiffs sought to apply to the Control Board. Here, in contrast, both the Government Ethics Act and the relevant portions of the Code of Conduct apply to employees, and their respective definitions of “employee” include those who work for OAH. Therefore, we do not believe that *Concerned Senior Citizens* is persuasive authority here.

There is another provision in the OAH enabling statute that one arguing that BEGA does not have jurisdiction over OAH could raise. It directs OAH’s Chief Judge to develop a code of professional responsibility for administrative law judges.²³ Conceivably, someone could argue that this code of professional responsibility sets out the ethics rules applicable to ALJs to the exclusion of all other ethics rules. One making this argument might note that the Ethics Act specifically makes BEGA employees subject to the Code of Conduct and authorizes BEGA to issue additional rules applicable to its employees,²⁴ and that if OAH’s ALJs were to be subject to both the Code of Conduct and any code of professional responsibility, the Council would have said so.

¹⁸ *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 81 (2002), quoted with approval in *Jackson v. D.C. Bd. of Elections & Ethics*, 999 A.2d 89, 102 (D.C. 2010) (“*Jackson*”).

¹⁹ *Cf.*, *Jackson*, 999 A.2d at 102 (no inference could be drawn that where a law listed improper topics of referenda, that the list was exhaustive).

²⁰ *District of Columbia Fin. Responsibility & Mgmt. Auth. v. Concerned Senior Citizens of the Roosevelt Tenant Assoc.*, 129 F. Supp. 2d 13, 16 (D.D.C. 2000) (“*Concerned Senior Citizens*”).

²¹ *Id.*

²² D.C. Official Code 45-1602 (1981 Ed.).

²³ D.C. Official Code § 2-1831.05(a)(9) (2012 Repl.).

²⁴ *Id.*, § 1-1162.06(c).

But nothing in the D.C. Code says or suggests that any code of professional responsibility applicable to ALJs is a substitute for the Ethics Act and the Code of Conduct. Nor does the D.C. Code provide that because the Chief Judge is charged with developing a code of professional responsibility for ALJs, the ALJs are exempt from BEGA's jurisdiction. Therefore, we believe that any argument that ALJs are exempt from the Ethics Act and BEGA's jurisdiction because the OAH Chief Judge is required to develop a code of professional responsibility would fail.

Bill 20-421 is Not Evidence that OAH is Exempt from BEGA's Jurisdiction

Section 2(b) of Bill 20-421, the "Universal Code of Conduct and BEGA Amendment Act of 2013," would expressly state that the Government Ethics Act and the Code of Conduct apply to all District government employees, including those working for independent agencies. The long title of the bill states that one purpose of this legislation is "to clarify that the Code of Conduct applies to the entire District government." If enactment of this provision will do away with frivolous arguments that an employee is exempt from BEGA's jurisdiction, it would serve a useful purpose. But it would not affect our conclusion: Under current law, the Code of Conduct applies to District employees including OAH employees, and those employees are subject to BEGA's jurisdiction. The introduction of Bill 20-421 does not alter this.

If you have any questions with regard to these comments, please contact Katherine Kelley, Assistant Attorney General, at 724-5533, or me at 724-5524.

JMR/kvk