

1979

Public Sector Labor Relations in the District of Columbia

Bruce Comly French

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

Bruce C. French, *Public Sector Labor Relations in the District of Columbia*, 28 Cath. U. L. Rev. 753 (1979).
Available at: <https://scholarship.law.edu/lawreview/vol28/iss4/6>

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

PUBLIC SECTOR LABOR RELATIONS IN THE DISTRICT OF COLUMBIA

*Bruce Comly French**

In the fall of 1978, the District of Columbia City Council enacted the District of Columbia Government Comprehensive Merit Personnel Act of 1978.¹ As mandated by the Congress in provisions of the 1973 Home Rule Act,² this complex statute will be the basis of all future personnel policies of the District government.

The Personnel Act covers all aspects of personnel policy, including classification of positions and compensation — setting schemes,³ standards of employee conduct and discipline,⁴ occupational safety and health programs for public employees,⁵ and employee benefit programs.⁶ The most

* Assistant Professor of Law, Claude W. Pettit College of Law, Ohio Northern University, Ada, Ohio. B.A., The American University 1969; M.A., The American University 1970; J.D., The Antioch School of Law 1975. Member, Bars of the District of Columbia and Pennsylvania

1. District of Columbia Government Comprehensive Merit Personnel Act of 1978, D.C. Law No. 2-139 (March 3, 1978)(original version at 25 D.C. Reg. 7450 (1978))(to be codified in scattered sections of the D.C. Code) [hereinafter cited as Personnel Act].

2. District of Columbia Self-Government and Governmental Reorganization Act, D.C. CODE ANN. §§ 101-771 (1973 & Supp. 1978) [hereinafter cited as Home Rule Act]. This Act delegates Congress' plenary authority over local matters to a popularly elected mayor and council. Council actions of a permanent legislative nature, however, require congressional review. D.C. CODE ANN. § 1-147(c)(1) (1973 & Supp. 1978): *as amended by* Pub. L. No. 95-526, § 2, 92 Stat. 2023 (1978). Section 422(3) of the Home Rule Act mandated consideration and adoption by the Council of a comprehensive merit personnel system for the District government and provided:

The District government merit system shall be established by act of the Council. The system may provide for continued participation in all or part of the Federal Civil Service System and shall provide for persons employed by the District government immediately preceding the effective date of such system personnel benefits, including but not limited to pay, tenure, leave, residence, retirement, health and life insurance, and employee disability and death benefits, all at least equal to those provided by legislation enacted by Congress, or regulation adopted pursuant thereto, and applicable to such officers and employees immediately prior to the effective date of the system established pursuant to this Act.

D.C. CODE ANN., § 1-162(3) (1973 & Supp. 1978).

3. *See* Personnel Act, *supra* note 1, at §§ 1101-1114.

4. *Id.* §§ 1601-1603 & 1801-1803.

5. *Id.* §§ 2001-2008.

6. *Id.* §§ 2101-2202 & 2601-2602.

significant feature of the Personnel Act, however, is its provision for comprehensive collective bargaining between the city government and recognized employee organizations.⁷ Thus, the prior statutory procedures for managing the personnel practices of more than 35,000 local government employees will be replaced by a system of collective bargaining over matters affecting compensation⁸ and working conditions.⁹ This new bargaining model will move the District's personnel system away from the federal civil service system, after which the D.C. system has been patterned for forty-five years.¹⁰

This article will focus upon the problem areas associated with the development of the labor-management relations program. It will discuss the creation of the Public Employee Relations Board [PERB] and explore collective bargaining policies, emphasizing the interaction and interpretation of statutes that directly affect the labor relations program.¹¹ Finally, conflicting provisions will be harmonized and, where necessary, amendatory language will be suggested.¹²

7. One explicit purpose of the Personnel Act is to establish a "positive policy of labor-management relations including collective bargaining between the District of Columbia government and its employees," *Id.* § 103(a)(6). The introductory note also states that "an effective collective bargaining process is in the general public interest and will improve the morale of public employees and the quality of service to the public." These two policy statements, when coupled with the express preemptive provisions of the Act, give life to the developing collective bargaining process authorized between management and labor representatives under the Personnel Act.

8. See notes 120-42 and accompanying text *infra*. The Personnel Act honors existing labor contracts, which generally authorize only bargaining over terms and conditions of employment. When the new personnel system is fully effective after January 1, 1980, all recognized exclusive representatives of "occupational groups" will be authorized to bargain over matters affecting compensation. In the interim, compensation plans will be set by the mayor, or one of the educational boards subject to the Council's approval.

9. See notes 89-105 *infra*.

10. The District's former personnel system, a mixture of various federal enactments and intergovernmental orders, stems partly from an Executive Order issued by President Hoover in 1930. Title V of the United States Code also specifically refers to the District of Columbia government. See generally Personnel Act, *supra* note 1, at § 3202. Other provisions of federal and D.C. law affecting District employees were amended or repealed by provisions of Title XXXII of the Personnel Act. *Id.* §§ 3201-3208. The District Personnel Manual (DPM), issued by the mayor, comprises the set of rules and regulations governing personnel policy for most executive agencies. The DPM is available for review at the Office of Personnel, Executive Office of the Mayor of the District of Columbia, 613 G Street, N.W., Washington, D.C. 20001.

11. This article will focus on the Act's two specific labor relations provisions: title V, which creates the Public Employee Relations Board [PERB] and title XVII, which outlines a labor-management relations program, and § 1113, which outlines provisions of the classification and compensation title affecting collective bargaining concerning compensation.

12. The complete text of the proposed amendatory act is set forth in Appendix A *infra*.

I. CONSIDERATION OF PERSONNEL LEGISLATION BY THE COUNCIL

In January, 1976, the Council began considering legislation that would ultimately form the basis of the Personnel Act. Throughout the year separate personnel-related bills were introduced, and public hearings and roundtable discussions were held.¹³ In December, 1976, Councilmember Arrington Dixon introduced a comprehensive merit personnel act¹⁴ that was reintroduced at the start of the next legislative term.¹⁵ Dixon's bill, and a companion measure introduced on behalf of Mayor Walter Washington,¹⁶ served as the legislative vehicles for the 1978 Personnel Act. The Committee on Government Operations, chaired by Dixon, had considered a broad range of potentially useful personnel policies.¹⁷ Subsequent Council floor consideration of the measure on July 25 and October 17 and 31, 1978, only concentrated on two aspects of the labor relations titles: those relating to the structure of the PERB and to the collective bargaining rights of fire fighters and police officers over minor disciplinary matters.¹⁸

13. COMMITTEE ON GOVERNMENT OPERATIONS, COUNCIL OF THE DISTRICT OF COLUMBIA, REPORT ON BILL NO. 2-10, DISTRICT OF COLUMBIA GOVERNMENT COMPREHENSIVE MERIT PERSONNEL ACT 10 (Comm. Print No. 4, 1978) [hereinafter cited as Comm. Print No. 4].

14. District Government Independent Merit Personnel Act, Council Bill No. 1-407, 23 D.C. Reg. 3891 (1976).

15. District Government Independent Merit Personnel Act, Council Bill No. 2-10, 23 D.C. Reg. 4488 (1977).

16. An Act to Establish a Merit Personnel Act for Employees of the District of Columbia Government, Council Bill No. 2-80, 23 D.C. Reg. 6463 (1977).

17. See Comm. Print No. 4, note 13 *supra*. Committee mark-up sessions were held on October 19, 21, 26, 28; November 2, 4, 16, 28, 1977; January 4, 18, February 1, 17; March 1, 15; April 19; May 3, 17, June 7, 17; and July 5, 1978.

18. For comments concerning the composition of the PERB, see note 39 *infra*. The relationship of sworn members of the police and fire departments (*e.g.*, those officers who actually perform uniformed or plainclothes police work or uniformed fire fighting work) to the Career Service, created in title VIII of the Personnel Act, *supra* note 1, at § 801, was controversial from the beginning. Following the Committee on Government Operations public hearing on April 7, 1977, a committee staff discussion bill was prepared, representing an apparent consensus of opinion of those testifying at the public hearing. See Committee Discussion Draft No. 1, 24 D.C. Reg. 443 (1977). Title VIII(B) of this discussion bill provided for a separate fire and police service. At the Committee's meeting on October 26, 1977, the Director of Personnel recommended elimination of the separate fire and police title with the caveat that minor adjustments be made to the definitions of "cause for removal" from the Career Service. See Transcript of the Meeting of the Committee on Government Operations, *reprinted in* LEGISLATIVE HISTORY OF THE D.C. PERSONNEL ACT, at 16-17 (1977) [hereinafter cited as LEGISLATIVE HISTORY]. These adjustments, included in §§ 1601(d)(10) & (16) of the Act, *supra* note 1, provided more rigorous standards for members of the Metropolitan Police Department, and apparently satisfied the public safety departments.

Thereafter, in an effort to force compliance with the decision of the D.C. Board of Labor Relations [BLR] (the PERB's predecessor) in BLR Case 6G 001-3 (Feb. 8, 1977), *rehearing*

On November 22, 1978, Mayor Walter Washington approved the new Personnel Act. In his message of approval, Mayor Washington expressed reservations about the policies endorsing the widespread collective bargaining enacted by the Council.¹⁹ The Mayor was particularly concerned that the city government was not prepared to handle a substantial increase in collective bargaining and recommended that the special implementation task force created by the Personnel Act give prompt attention to the speed with which full-scale collective bargaining would become operational.²⁰ After the thirty day congressional review period, the Personnel Act became effective on March 3, 1979.²¹

en banc (May 27, 1977), directing the mayor and the chief of police to submit matters of minor discipline to the grievance system under the collective bargaining agreement between the Police Department and Local No. 442, the International Brotherhood of Police Officers, Councilmember Arrington Dixon introduced the Police Manual Amendment Act of 1978, Council Bill No. 2-344, 24 D.C. Reg. 10545 (June 16, 1978) which legislatively mandated compliance with the BLR decision. This bill's introduction precipitated intervention by the fire and police chiefs before the Committee on Government Operations and, ultimately, before the full Council during sessions. *See generally* Transcript of the Meeting of the Committee on Government Operations, *reprinted in* LEGISLATIVE HISTORY, *supra*, at 52-100.

In spite of a contrary BLR decision, an initial Council vote on October 17, 1978, placed significant limitations on the ability of police officers to present minor grievances concerning disciplinary matters. At a Council meeting of October 31, 1978, however, the majority reversed itself, and endorsed the original committee recommendation, which had provided for similar treatment of police officers, fire fighters and other employees. *See* Transcript of the Meeting of the Council *reprinted in* LEGISLATIVE HISTORY, *supra*, at 9-10 (Remarks of Councilmember Arrington Dixon). *See also* text of the Personnel Act as adopted on its first reading, October 17, 1978, which divested sworn public safety officers of the privilege to collectively bargain over minor disciplinary matters.

19. Mayor Washington approved the Personnel Act, but noted several reservations. Chief among his concerns was the fear that employee morale would be adversely affected by a diversity of negotiated pay systems among the 64 recognized exclusive bargaining units, which was possible because provisions of the Act permitted individual bargaining by these units over compensations as well as other matters. Statement to the Council of the District of Columbia (November 22, 1978).

20. *See* note 19 *supra*, at 4. Section 3603 of the Personnel Act authorized the establishment of a Task Force on the Implementation of the Merit Personnel Act to "study and review the implementation of [the Personnel] Act giving special attention to the implementation timetable." *See* Personnel Act, *supra* note 1, at § 3603(c). Thus, while the primary responsibility of the task force was to consider the effective date of the Act's various provisions, Mayor Washington recommended reconsideration and modification of the Council's policy decisions.

21. All legislative enactments of the Council are subject to a thirty day congressional review period. D.C. CODE ANN. § 1-147(c)(1) (1973 & Supp. 1978), *as amended by*, § 2, Pub. L. No. 95-526, 92 Stat. 2023 (1978).

II. COLLECTIVE BARGAINING BY PUBLIC EMPLOYEES WITH THE DISTRICT OF COLUMBIA GOVERNMENT PRIOR TO THE 1978 ACT

The Personnel Act's collective bargaining model emerged from the District's prior experiences with labor relations programs.²² On September 25, 1962, for example, the District Personnel Manual (DPM)²³ included provisions authorizing limited consultation about working conditions between the city government and representatives of public employees.²⁴ These provisions were subsequently amended, creating a Board of Labor Relations [BLR],²⁵ whose members were appointed by the mayor and included representatives of management, labor, and the public.²⁶ By the time the Council enacted the Personnel Act, over sixty employee organizations had been granted exclusive recognition to negotiate matters affecting working conditions.²⁷

In 1974, congressional legislation authorized fire fighters and police officers to bargain over compensation matters²⁸ and permitted teachers to

22. The District government had collective bargaining agreements with 64 exclusive representatives at the time of the Personnel Act's consideration. See note 19 *supra*, at 4.

23. The District Personnel Manual (DPM), *supra* note 10, includes the rules and regulations governing personnel practices by the city government. Comparable documents have been adopted by agencies with semi-autonomous power, such as the District of Columbia Board of Education and the Board of Trustees of the University of the District of Columbia. Chapter 25-A, added to the DPM in 1962, set the guidelines for a limited program of collective bargaining with recognized employee organizations.

24. The DPM at 25A-11 states in pertinent part: "An agency and a labor organization that has been accorded exclusive recognition shall meet . . . and confer . . . with respect to personnel policies . . . affecting working conditions, so far as may be appropriate under applicable laws and regulations."

25. Commissioner's Order No. 70-229, June, 1970, *as further amended by* Commissioner's Order No. 72-270, November, 1972. A commissioner's order by the former mayor-commissioner of the District of Columbia is similar to a current mayor's order or an executive order of the president.

26. The Board of Labor Relations was composed of two representatives of management, two representatives of labor organizations having exclusive recognition, and one neutral member who represented the public and served as chairperson. See DPM at 25A, *supra* note 10, at 6-7.

27. See note 19 *supra*.

28. Sections 111 and 112 of the Reese Act, D.C. CODE ANN. §§ 31-1501(a) & 34-838 (1973 & Supp. 1978) which was designed to increase compensation for District of Columbia policemen, firemen, and teachers and to increase annuities payable to retired teachers in the District of Columbia, also authorized collective bargaining for fire fighters and police officers. Pursuant to § 1114 of the Personnel Act, the Mayor will adjust pay for these public safety employees through the fiscal year ending September 30, 1980. Section 3207(e) will repeal corresponding provisions of the Reese Act when the compensation bargaining provisions of the Personnel Act become effective.

“consult”²⁹ with the District of Columbia Board of Education concerning compensation matters.³⁰ The mayor also had power to bargain with sanitation workers over wages and personnel matters.³¹ Conflicts affecting compensation of the non-civilian police and fire fighters were resolved by arbitration³² although the Council had authority to enact a compensation plan different from that gained through arbitration or negotiated by the Mayor.³³ In fact, independent Council action did occur following the submission of the first collective bargaining package between the city government and the public safety unions after Home Rule.³⁴

The BLR was empowered to oversee limited collective bargaining over compensation and to negotiate matters affecting working conditions governed by the District Personnel Manual.³⁵ The Board's impact, however, was limited by its lack of independent enforcement power and the absence of a statutory procedure for court enforcement. For example, when the Personnel Act was still in a developmental phase, the District government refused to honor a BLR decision directing it to submit minor disciplinary disputes to arbitrators in the police department as required by the collective bargaining agreement.³⁶ To prevent similar refusals in the future, the Personnel Act authorizes the Superior Court to enforce labor board orders.³⁷

29. Consultation differs from negotiation in that the outcome of consultation is not binding upon the parties. See generally note 82 *infra*.

30. Section 203 of the Reese Act, D.C. CODE ANN., § 31-1501(a) (1973 & Supp. 1978), has been interpreted by the Board of Education as authorizing consultation with representatives of public school teachers, even though that section does not expressly provide for such consultation.

31. 5 U.S.C. § 5349 (1976). See Transcript of the Meeting of the Committee on Government Operations, reprinted in LEGISLATIVE HISTORY, *supra* note 18, at 113 (remarks of George Harrod, Director of Personnel, D.C. Government).

32. D.C. CODE ANN. § 4-839(c) (1973 & Supp. 1978), now preempted by the Personnel Act, provided: “If mediation does not resolve the impasse . . . an impartial Board of Arbitration [shall be appointed] to investigate . . . and . . . issue a written award . . . [which] shall be final and binding upon the parties to the dispute.”

33. See Personnel Act, *supra* note 1, at § 1113(i), authorizing the Council to reject a proposed compensation package by a vote of two-thirds of its members.

34. District of Columbia Police and Fireman's Salary Act Amendments of 1975, D.C. CODE ANN. § 4-823(a) (1973 & Supp. 1978).

35. See note 23 and accompanying text *supra*.

36. See note 18 *supra*. The labor relations chapter of the DPM contained no self-executing provisions.

37. *Id.* The remedial authority vested in the Superior Court of the District of Columbia to enforce orders of the Public Employee Relations Board pursuant to § 1713 of the Personnel Act will be considered in notes 58-76 and accompanying text *infra*.

III. STRUCTURAL ASPECTS OF THE PUBLIC EMPLOYEE RELATIONS BOARD [PERB]

In view of the need for an administrative and enforcement commission stronger than the BLR, the Public Employee Relations Board [PERB] was created as an independent agency of the District government.³⁸ The five-person panel of the PERB is divided one-one-three between management, labor, and "neutral . . . public members,"³⁹ as compared with the two-two-one composition of the BLR that balanced management and labor representatives in a dominant role, with a single neutral member serving as the chairperson.⁴⁰ The modified scheme was designed to ensure greater unanimity in PERB decisions, but it was generally opposed by both management and labor representatives.⁴¹ Opposition centered upon the special interests of the two groups in contrast to the generalized public interest purportedly represented by the neutral members.

Although the Act provides the PERB with a number of powers similar to those vested in the BLR, there are significant differences.⁴² For exam-

38. Personnel Act, *supra* note 1, at § 501(a). Subsection (b) provides that:

The mayor shall select members of the Board from persons who through their experience have demonstrated an expert knowledge of the field of labor relations and who possess the integrity and impartiality necessary to protect the public interest and the interests of the District of Columbia government and its employees. Every effort shall be made to select members who have experience in public sector labor relations and preference shall be given to such persons in the Mayor's appointments to the Board.

39. *Id.* § 501(c). The ultimate configuration was recommended by counsel to the Superintendent of Schools. See Letter from George R. Margolies, Legal Counsel to the Superintendent of Schools, to Bruce Comly French, Staff Director, Committee on Government Operations, at 2 (September 2, 1977), reprinted in Personnel Distribution No. 13 (September 17, 1977). The personnel distributions were packets of information distributed to members of the Committee and the public prior to meetings concerning the personnel legislation (available at the Legislative Services Unit, Council of the District of Columbia, District Building, Washington, D.C. 20004).

The configuration of the PERB was also discussed at a Council session on October 17, 1978. See Transcript of the Council Meeting reprinted in LEGISLATIVE HISTORY, *supra* note 18, at 23-24 (Remarks of Councilmember Wilhelmina Rolark, presenting, and then withdrawing, amendments to restructure the PERB to the old BLR two-two-one arrangement, as recommended by representatives of labor). See also Letter to Councilmember Arrington Dixon from Geraldine Boykin, Executive Director, Council 20, American Federation of State, County, and Municipal Employees [AFSCME](August 31, 1978), at 2.

40. Amendments are proposed in § 2(a) of the proposed amendatory act, Appendix A *infra*, to recognize the effectiveness of a companion act, which requires confirmation of the PERB's members. Confirmation Act of 1978, § 2, D.C. Law No. 2-142, 25 D.C. Reg. 6112 (1979). Mayor Barry transmitted amendments to the same effect to Council Chairman Arrington Dixon on February 24, 1979.

41. See, e.g., note 39 *supra*.

42. The powers of the BLR were set forth in item 4, chapter 25A, of the DPM. These administrative regulations were substantially the same as section 502 of the Personnel Act.

ple, both before and after enactment of the Personnel Act, labor and management negotiate unit determinations⁴³ for purposes of bargaining over working conditions. The Act, however, authorizes the PERB to intervene only in cases of dispute.⁴⁴ This limitation prevents the PERB from enforcing factors affecting unit determinations when a collective bargaining representative seeks exclusive recognition without opposition by management. Nevertheless, the PERB is granted authority elsewhere in the statute⁴⁵ to "determin[e] . . . an appropriate unit . . . [without] a request from a labor organization" for the purposes of collective bargaining over compensation matters.⁴⁶ Additionally, the PERB is expressly authorized to "decertify"

Subsections (1)(l) to (p) of the Personnel Act are new, having no specific counterpart in prior regulations specifying powers of the BLR. Subsections (1), (n), and (p) of the new provisions relate to the appointment of legal counsel, the decision-making process of the Board, and judicial review and enforcement of PERB orders. Subsection (m) authorizes the establishment of lists of "qualified mediators, factfinders and arbitrators," and subsection (o) provides for the collection of information concerning the labor-management relations program. See 25 D.C. Reg. 5791-92 (Jan. 5, 1979). See also notes 53 & 58-76 and accompanying text *infra* for a fuller discussion of these provisions.

43. The concept of "unit determination" encompasses the notion that management must engage in collective bargaining with a definable "unit" or group of employees that has discernible, mutual interests. Section 1709 of the Personnel Act, *supra* note 1, authorizes bargaining units to be formed among bargaining units of employees who represent a "community of interest," for example, those who share similar skills, interests, and working conditions. The factors to be considered under the Act are substantially the same as those under the BLR administrative regulation. Some states encourage large bargaining units so that "unnecessary fragmenting [is] avoided," see, e.g., ALASKA STAT. § 23.40.090 (1972), while others recognize statewide bargaining units. See generally Shaw and Clark, *Determination of Appropriate Bargaining Units in the Public Sector: Legal and Practical Problems*, 51 ORE. L. REV. 152 (1971).

44. The Personnel Act *supra* note 1, at § 502(a), authorizes the PERB to "resolve unit determination questions and other representation issues (including but not limited to disputes concerning the majority status of a labor organization)." This provision continues the former practice of the BLR which enabled labor and management to enter into agreements with units designed to effectuate their best interests without strict compliance with the guidelines. The Committee on Government Operations considered giving plenary authority to the PERB to determine appropriate bargaining units in order to minimize collusion between labor and management in the creation of units which might lead to excessive fragmentation. See Transcript of the Meeting of the Committee on Government Operations, reprinted in LEGISLATIVE HISTORY, 1977, *supra* note 18, at 2-219, 2-220 (remarks of Bruce Waxman, Esq., Executive Director, BLR). The Committee counsel suggested that the PERB could, in effect, challenge improperly constituted units remedially by refusing to hold an election or refusing to decide a case involving unfair labor practices other than the legal adequacy of the bargaining unit. *Id.* at 2-223 (remarks of Bruce Comly French, Staff Director and Counsel, Committee on Government Operations). This discussion does not consider the PERB's authority to create appropriate bargaining units for the purpose of negotiations concerning compensation. See notes 138-42 and accompanying text *infra*.

45. See Personnel Act, *supra* note 1, at § 1716(b).

46. This fragmenting of bargaining, whereby an employee could be in one unit for purposes of bargaining over working conditions and in another, larger "occupational group" for

representatives already recognized for a variety of reasons.⁴⁷ This authority existed by implication only under the prior administrative regulation.

As an independent agency, the PERB is in the position to ensure that management and labor organizations follow the "ground rules" of public sector collective bargaining as authorized and encouraged under the Personnel Act.⁴⁸ In this respect, its function is similar to that of the National Labor Relations Board in the private sector,⁴⁹ and to state or local public personnel agencies across the United States.⁵⁰ Parties will only resort to the PERB when the bargaining process breaks down, requiring outside, neutral intervention for crisis resolution. Thus, the effectiveness of the PERB's remedial powers are critical to the smooth operation of the new collective bargaining system.

In order to resolve a bargaining impasse, the PERB may impose an "escalation scale" of remedies,⁵¹ ultimately resulting in binding third-party

purposes of bargaining over compensation, will be discussed below in greater detail. *See* notes 120-42 and accompanying text *infra*.

47. The Personnel Act, *supra* note 1, at § 502(b), authorizes the PERB to "certify and decertify exclusive bargaining representatives." The certification of an exclusive representative follows an affirmative showing of support for it by the members of a bargaining unit. *See generally* notes 93-95 and accompanying text *infra*. The decertification process governed by the Personnel Act, *supra* note 1, at § 1710(b)(2), authorizes the holding of an election to determine if a particular exclusive representative continues to enjoy the support of its membership.

48. For a discussion of PERB's role in the collective bargaining process, see notes 89-111 and 120-42 and accompanying text *infra*.

49. See 29 U.S.C. §§ 151-164 (1976) for a statement of the powers of the NLRB. Section 152(2) expressly exempts "any State or political subdivision thereof" from the definition of "employer." Thus, public sector labor relations operates in the context of state or local law. Organizing by federal employees, except in the District of Columbia, is governed by the provisions of Executive Order 11,491, as amended, Labor-Management Relations in the Federal Service, issued on October 29, 1969 by President Richard M. Nixon. *See* Exec. Order No. 11,491, 3 C.F.R. § 262 (1973).

50. *See, e.g.*, CONN. GEN. STAT. §§ 7-467 to 7-479 (1976).

51. *See* Personnel Act, *supra* note 1, at § 502(d), which authorizes the PERB to "resolve bargaining impasses through fact finding, final and binding arbitration or other methods agreed upon by the parties as approved by the Board." Impasse resolution tools are to be selected according to "the prerogative of the Board, after appropriate consultation with the interested parties." *Id.* § 1702(d). Section 1702(c) provides a variety of remedies for bargaining impasses, ranging from mediation to fact finding, and arbitration. The Committee on Government Operations decided against any particular hierarchy of sanctions and in favor of ad hoc imposition of sanctions by the PERB. The first proposed amendment to § 502 (§ 2(b) of the proposed amendatory act) would remove the redundant and confusing language of § 502(d) and transfer all matters affecting the impasse process to § 1702(c) & (d). *See also* § 2(j) of the proposed amendatory act. Further amendments are intended to link impasse resolution procedures affecting working conditions bargaining with compensation bargaining. The limitation upon final best offer arbitration on an item-by-item basis in non-compensation matters in § 1702(c) would be removed.

arbitration.⁵² The PERB maintains lists of qualified mediators, fact finders, and arbitrators, and thus, it can select qualified arbitrators at random to assist parties involved in a particular dispute.⁵³ This enables the PERB to review impartially the decision of a third-party facilitator⁵⁴ before invoking judicial review.⁵⁵ The PERB is also authorized to determine "disputed cases"⁵⁶; that is, those cases in which the parties disagree as to whether a particular matter is negotiable, and therefore within the scope of the bargaining process, or exempted from negotiation under the management's rights clause.⁵⁷

In addition to granting PERB broader supervision over the collective bargaining process, the Personnel Act provides for judicial enforcement of PERB decisions through preliminary restraining orders and appeals from

52. While § 1702(d) of the Personnel Act provides that "impasse resolution procedures may be conducted by the Board, its staff, or third parties chosen either by the Board or by the mutual concurrence of the parties to the dispute," it is apparent that arbitration proceedings shall not be conducted directly by the Board. *Id.* § 502(d). Thus, the provisions of §§ 502(d) and 1702(d) can best be read *in pari materia* by limiting the PERB's role in arbitrations to the selection of arbitrators. *Id.* § 1113(e)(1), (2) & (3). This interpretation is consistent with general principles of statutory analysis which hold that a specific provision (namely § 502(d)) will control more general provisions (namely, those in title XVII). *See* Lodge 1858, American Fed. of Gov't. Emp. v. Webb, 580 F.2d 496, 510 (D.C. Cir. 1978), *cert. denied*, 99 S. Ct. 311 (1978); 2A SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 46.05 (4th ed. 1973).

53. Personnel Act, *supra* note 1, at § 502(d). *See also id.* § 502(m), which authorizes the maintenance of lists and appointment of qualified mediators, factfinders, and arbitrators. *See* note 51 *supra*.

54. The Act empowers the Board to "consider appeals from arbitration awards pursuant to a grievance procedure." Personnel Act, *supra* note 1, at § 502(f). This limited authority only applies to grievance proceedings occurring under a collective bargaining agreement which is currently in force. The Act authorizes the Board to "hear any matter brought to it." *Id.* § 502(1). This broad grant of plenary power, when supplemented with the authority to adopt "rules and regulations for the conduct of its business and the carrying out of its powers and duties" may enable the PERB to hear additional matters and to actually develop a program of labor-management relations. *Id.* at § 502(k). Section 2 of the proposed amendatory act expands review of arbitration awards beyond those arising under a grievance system, which is particularly appropriate in light of the public policy behind the PERB's resolution of all disputes affecting labor-management relations.

55. *See* Personnel Act, *supra* note 1, at § 502(1)(a) & (p) and § 1713, discussed more fully in notes 58-73 *infra*. The Act provides in pertinent part: "No defense or objection to an order of the Board shall be considered by the court, unless such defense or objection was first urged before the Board." *Id.* § 1713(b). When § 1713(b) is read along with § 502(f), which preempts the District's earlier arbitration act, it is apparent that the PERB should get the 'first shot' at all public sector labor-management relations disputes.

56. *See id.* § 502(e). The earlier administrative regulation gave the BLR the authority to decide whether a matter "shall be subject to a grievance procedure." *See* DPM Chap. 25A, § 4a(6) (1970). Thus, the new, broader authority of the PERB is untested.

57. *See* Personnel Act, *supra* note 1, at § 1708. The management's rights clause is discussed at notes 102-03 and accompanying text *infra*.

final orders.⁵⁸ Moreover, the Act grants PERB extensive new authority to issue and enforce remedial orders concerning disputes over collective bargaining as well as adjudication of unfair labor practices.⁵⁹ This enforcement power represents a significant redistribution of power in the management of public sector labor disagreements within the District of Columbia.⁶⁰

To enforce its orders, the PERB may petition the Superior Court of the District of Columbia to "enforce any order issued pursuant to [labor — management relations]."⁶¹ Orders of the PERB may be modified, enforced, or set aside as inappropriate,⁶² but PERB's findings of fact are conclusive if supported by substantial evidence on the record considered as a whole.⁶³

Judicial review of the PERB's final orders is less straightforward. The PERB is authorized to sit as a full Board in three-member panels.⁶⁴ This

58. *Id.* Section 1713(b) governs the award of "temporary relief or restraining orders," while subsection (c) provides for judicial review of a "final order" by the Superior Court of the District of Columbia.

59. Adjudication of unfair labor practices, governed by the provisions of § 1704 of the Act will continue to be an important function of the labor board. *See generally* notes 113-18 and accompanying text *infra* for a fuller explanation. Unfair labor practices, whether by management or labor, generally include conduct that is prohibited under the Personnel Act and is outside the "ground rules" of the authorized labor-management relations program. With regard to the PERB's remedial enforcement authority, see note 42 *supra* and notes 113-19 and accompanying text *infra*.

60. Under the prior administrative regulations, the BLR had no authority to enlist the aid of the Superior Court to carry out its orders. *See* DPM Chap. 25A, § 18d(2) (1970). An action in the Superior Court was available, however, to parties seeking to enjoin illegal actions under local or federal law—such as a strike by government employees. *See* *Reed v. Washington Teachers' Union, Local 6, C.A. No. 2534-79*, (D.C. Super. Ct. March 21, 1979) and *Orders of the Honorable Gladys Kessler, Judge, Superior Court of the District of Columbia*.

61. *See* Personnel Act, *supra* note 1, at § 1713(b).

62. *Id.* *Cf.* D.C. CODE ANN. §§ 1-1156(b)(3) & -1510 (1973 & Supp. 1978).

63. *Id.* The Personnel Act, however, provides: "Upon reviewing the final decision of the Board, the court shall determine if it is supported by substantial evidence and not clearly erroneous as a matter of law." *Id.* § 502(1). The two provisions cited are clearly in conflict and can best be reconciled by resorting to one standard, preferably that of § 502(1), which is more rigid. *Cf.* 29 U.S.C. § 160(e) (1976). Amendatory language is proposed in Appendix A to reconcile this conflict. Should the dual standard not be amended, the safest course would be to apply the twin-test of § 502(1). *See* § 2(r) of the proposed amendatory act in Appendix A *infra*.

64. *See* Personnel Act, *supra* note 1, at § 501(1). In fashioning the three-member panel, the Committee on Government Operations built upon the "panel hearing" concept which had been developed for matters before the District of Columbia Board of Elections and Ethics. D.C. CODE ANN. § 1-1105(h) (1973 & Supp. 1978). Similar panel hearings were provided for in matters before the city's newly created Office of Employee Appeals. *See* Personnel Act, *supra* note 1, at § 601(d). The use of the panel concept is solely within the

provision was included to allow the PERB to hear matters without all members being present.⁶⁵ On the motion of "any adversely affected party," a three-member panel decision is reviewable by the full Board and the Superior Court of the District of Columbia may review either a panel or full Board decision.⁶⁶ If the PERB decides to hear a matter *en banc*, a decision of the three-member panel may be stayed.⁶⁷ The full Board may hear matters of fact and law *de novo* or rely upon the record established before the panel.⁶⁸ A final decision of the PERB, whether *en banc* or by a panel, is reviewable in the Superior Court of the District of Columbia as a final order.⁶⁹

The most ambiguous provision regarding panel decisions concerns their

discretion of the full PERB—the "[b]oard may hear any matter brought to it under this act by a three (3) member panel"—and can only be implemented by the adoption of clarifying rules and regulations. *Id.* § 502(k).

65. Although § 502(1) of the Personnel Act, authorizes an *en banc* rehearing by the full PERB of panel decisions, members of the committee and public witnesses before the Committee on Government Operations generally sought to limit such rehearings. See Transcript of the Meeting of the Committee on Government Operations, reprinted in LEGISLATIVE HISTORY *supra* note 18, at 2-185 to -191 (remarks of Councilmembers Arrington Dixon and Marion Barry, Jr.; Marlene Johnson, staff counsel to Marion Barry; Bruce Comly French, committee staff director and counsel; and Bruce Waxman, executive director, BLR). See Appendix A *infra* (proposed amendments to § 502(1) of the Personnel Act to clarify the nature of the *en banc* review).

66. Personnel Act, *supra* note 1, at § 502(1). The concept of "any adversely affected party" is drawn from the District of Columbia Administrative Procedure Act, which authorizes judicial review following a "contested case." D.C. CODE ANN. § 1-1510 (1973 & Supp. 1978). Jurisdiction is necessarily set in the Superior Court of the District of Columbia because jurisdiction would not lie in the Court of Appeals under the DC-APA because "the selection or tenure of an officer or employee of the District" is expressly excluded from the definition of "contested case." D.C. CODE ANN. § 1-1502(8)(B) (1973 & Supp. 1978). See generally *Kew Gardens Joint Venture v. D.C. Hous. Rent Comm'n*, 359 A.2d 269 (D.C. 1976); *Columbia Realty Venture v. D.C. Hous. Rent Comm'n*, 350 A.2d 120 (D.C. 1975).

67. While the full PERB may "stay" the effect of a decision of a panel, the statute is ambiguous as to how this may occur:

If an appeal is taken from a decision of a three (3) member panel to the full Board, the decision of the three (3) member panel shall be stayed pending a final decision of the Board. Upon a vote of the majority of its members, the Board . . . may hear . . . an appeal of a decision of the three (3) member panel . . . "

Personnel Act, *supra* note 1, at § 502(1). This provision appears to authorize a stay by operation of law when an *en banc* hearing is sought. The "final decision of the Board" implies that a full hearing has been granted and heard and that a new decision of the *en banc* body is now available. Draft amendatory language is proposed in Appendix A to clarify that decisions of panels are final when rendered but that the PERB may stay the effect of such decisions should it determine to hold an *en banc* hearing. See also note 65 *supra* (policy objectives concerning the limitation of rehearings).

68. *Id.*

69. A final order will be a jurisdictional basis for judicial review by the Superior Court of the District of Columbia. *Id.* Cf. 28 U.S.C. § 1291 (1976).

finality. The Act states that "if [an appeal from a panel decision is] not taken within one hundred twenty (120) days the decision shall be final."⁷⁰ This provision arguably requires that no panel decision may be enforced for a 120 day period because it is not final. Nonetheless, an equally plausible interpretation might require pro forma review by the full PERB in each case to assure a final order. The provision might also serve as a jurisdictional bar to review.

From both logical and administrative law viewpoints, the panel order should be treated as final when it is rendered. If the parties choose to comply with the terms of the order, no judicial review or enforcement would be required. If compliance did not occur, however, then the PERB or the party interested in compliance might seek an order from the Superior Court to force compliance. Finally, if no appeal were brought to the Superior Court within 120 days, then judicial review would be precluded. As such, the 120 day period may be read as a jurisdictional bar to judicial action vis-a-vis a panel decision. Furthermore, no provision of the Personnel Act prevents the PERB from adopting rules "for the conduct of its business,"⁷¹ thereby specifying more clearly procedures for reviewing panel and Board decisions. Treating the panel order as final upon a petition for an *en banc* rehearing would suffice until the full PERB votes to grant such a hearing.⁷² The PERB could then order the panel's decision stayed.

Parties may file an appeal from a final Board order within thirty days of its issuance.⁷³ This time period is similar to that for noting an appeal in a civil action from the Superior Court to the District of Columbia Court of Appeals.⁷⁴ It is likely that parties to a dispute will be routinely authorized to intervene in an enforcement action brought by the PERB in the Superior Court.⁷⁵

The creation of an independent neutral agency to manage public sector labor relations is consistent with most statutory schemes. Authority in the PERB to consider unit determination, representation matters, and unfair labor practices conforms with national practice. Amendatory language, however, is essential to clarify the procedural aspects of reviewing panel

70. Personnel Act, *supra* note 1, at § 501(1). See also Comm. Print No. 4, *supra* note 13, at 59 which concludes that the 120 day period is an absolute jurisdictional bar. Impliedly, a shorter one could be set by rule.

71. Personnel Act, *supra* note 1, at § 502(k).

72. See proposed amendatory language to § 502(1) in Appendix A *infra*. See also note 67 *supra*.

73. Personnel Act, *supra* note 1, at § 1713(c).

74. D.C. APP. R. 4(II)(a)(1).

75. D.C. SUPER. CT. CIV. R. 24.

decisions, if the PERB decides to create such bodies and to set one standard of judicial review of questions of law under the Personnel Act.⁷⁶

IV. THE SUBSTANTIVE ASPECTS OF THE LABOR-MANAGEMENT RELATIONS PROGRAM

The substantive provisions of the new labor-management relations program are generally found in title XVII of the Personnel Act.⁷⁷ These provisions reflect the Council's policy that "an effective collective bargaining process is in the general public interest and will improve the morale of public employees and the quality of service to the public."⁷⁸ Other laudable goals of the act — some of which were subsequently limited by other specific limitations of the title — include: a guarantee of the right to join or not to join a union (but not the right to avoid an agency fee if properly negotiated);⁷⁹ the right to engage in collective bargaining concerning terms and conditions of employment (and for compensation matters as separately authorized in the Personnel Act);⁸⁰ the right to be protected in the exercise of rights guaranteed under the Act;⁸¹ and the right to have the mayor or other appropriate personnel authority meet with recognized labor organizations at reasonable times to bargain in good faith.⁸²

76. See Appendix A *infra*. See also notes 63-72 and accompanying text *supra*.

77. Other elements may be found in titles II (coverage of the Personnel Act over certain employee groups), XI (classification and compensation), and XVI (adverse actions and grievances). Note that various substantive powers in title V are proposed to be transferred to title XVII in the proposed amendatory act. See note 51 *supra*.

78. Personnel Act, *supra* note 1, at § 1701.

79. Compare *id.* §§ 1701(a) & 1706(a) (generally providing for joining, assisting, or forming a labor organization, or refraining from such activity; engaging in collective bargaining as authorized under the Act; and protection in the exercise of such rights) with *id.* §§ 1707 & 1711(a) (providing for collective bargaining concerning agency or service fees for persons in a bargaining unit not belonging to a labor organization). See generally note 112 and accompanying text *infra*.

80. Personnel Act, *supra* note 1, at §§ 1701(a) & 1706(a). Bargaining concerning compensation matters is governed by the Personnel Act, § 206, as described in notes 120-42 and accompanying text *infra*.

81. *Id.* § 1701(a)(3).

82. *Id.* § 1701(b), provides that "the Mayor or appropriate personnel authority . . . shall meet at reasonable times with exclusive employee representatives to bargain collectively in good faith." Appropriate personnel authorities are defined in § 406 as the mayor, for all District government employees, except the District of Columbia Board of Education and the Board of Trustees of the University of the District of Columbia which will bargain for their non-educational employees; the heads of ten small, independent agencies; and the Council of the District of Columbia and the District of Columbia courts, each of which are granted independent personnel authority by the Personnel Act. *Id.* § 406. Negotiation in good faith is the *sine qua non* of an effective, collective bargaining process.

The lower employer-employee relations standards of "meet and confer" or "consultation" were frequently urged by representatives of the Office of Personnel. See Letter from George

Employee participation in the collective bargaining process under the Personnel Act is more limited than that permitted under federal law or by the former administrative regulation governing labor-management relations. Supervisors are excluded from participation under the Act,⁸³ as are other discrete classes of employees,⁸⁴ such as those engaged in personnel activities in other than a clerical capacity⁸⁵ and employees of the Council of the District of Columbia.⁸⁶ These exclusionary provisions appear in two separate sections of the Act, and the general bar to supervisory participation in section 1701 is further qualified in section 1709.⁸⁷ Proposed

R. Harrod, Director of Personnel, D.C. Government, to Councilmember Arrington Dixon (September 14, 1977). Only California, Kansas, Michigan, and Missouri currently have such limited collective bargaining in the public sector. *Compare* Advisory Committee on Intergovernmental Relations, "State Public Employee-Management 'Meet and Confer' Act," (May, 1970) *with*, "State Public Employee-Management 'Collect Negotiations' Act," (May, 1970), *reprinted in* GOVERNMENT EMPLOYEE RELATIONS REPORTER 51:211, :217 (1973). *But cf.* Personnel Act, *supra* note 1, at § 1801, which allows the lower standard of consultation only with regard to rules governing the ethical conduct of government employees. The members of the Committee had the benefit of a study conducted by the State of Wisconsin, which had initially adopted an incremental consultation system, but later abandoned it in favor of full negotiation as incorporated by the Personnel Act. *See* Council of State Governments, State Employee Labor Relations 5-7 (1977), *reprinted in* Personnel Distribution, November 16, 1977.

83. *See* Personnel Act, *supra* note 1, at § 1701(c). *Compare* the definition of "supervisor" found in § 3(x) of Chapter 25A of the DPM, *supra* note 10, *with* § 1701(c). Section 1701(c) expands the earlier definition to include: "an incumbent of a position which is classified at a level higher than it would have been had the incumbent not performed some or all of the above duties [listed within the definition]." *See* 29 U.S.C. § 152(11) (1976) for the federal definition of a "supervisor" in the private labor market. The ambiguity of the Act's definition which attempted to expand the number of employees considered to be supervisors, was noted in comments of the U.S. Civil Service Commission. Letter from Norman Beekman, Director, Bureau of Intergovernmental Personnel Programs, U.S. Civil Service Commission to Sterling Tucker, Chairman, Council of the District of Columbia (Oct. 2, 1978) [hereinafter cited as Beekman Letter]. The legislative record is unclear as to management's objective in including such broad ambiguous language. Apparently, this provision gives supervisory status to persons engaging in management activities, such as the senior person on a night-shift of workers, in the absence of any other supervisory personnel. Amendatory language to restore the earlier unambiguous language is proposed in Appendix A, *infra*, at § 2(i) & (o).

84. Personnel Act, *supra* note 1, at § 1709(b).

85. *Id.* § 1709(b)(3).

86. *Id.* § 1709(b)(6).

87. Sections 1709(b) and 1701(c) are interesting in that supervisors are generally excluded from participation in a bargaining unit under § 1701(c), while an exception to that exclusion is authorized in § 1709(b)(1):

[a]ny management official or supervisor [may not be included within a unit]: EXCEPT, That with respect to firefighters, a unit that includes both supervisors and non-supervisors may be considered: PROVIDED, FURTHER, That supervisors employed by the District of Columbia Board of Education may form a unit which does not include non-supervisors.

amendatory language collects these exclusionary provisions, along with exemptions to such provisions, in a single section for greater clarity.⁸⁸

An important feature of the Act is the collective bargaining process concerning working conditions. After determining appropriate bargaining units, under guidelines identical to those used prior to the Act,⁸⁹ the "majority status" of a prospective bargaining representative must be established.⁹⁰ Organizations granted exclusive recognition by the BLR will retain this status until consolidation or decertification.⁹¹ This continuing status evolved from both practical and political considerations. Practically, it would have been impossible to require the PERB to consider applications for unit determinations and exclusive representative status from all existing unions at one time. Politically, the support of the existing organized labor membership was essential to the final passage of the Personnel Act. In circumstances other than bargaining over compensation matters, consolidation of units may be achieved only where the labor organization seeking consolidation is already the exclusive representative of both groups.⁹²

The Act explicitly sets forth procedures for selecting an exclusive representative.⁹³ Of particular merit is the requirement that a true majority of

Supervisory officers in the Metropolitan Police Department sought inclusion under the exceptions discussed above "for the limited purpose of negotiating pay and fringe benefits." See Letter from Larry C. Williams, Sr., Esq. to Councilmember Arrington Dixon (Oct. 30, 1978). This proposal was not considered at the Council's final consideration of the Personnel Act on October 31, 1978.

88. See Appendix A, *infra*, at § 2(o). See also note 83 *supra*.

89. Compare Personnel Act, *supra* note 1, at § 1709(a) with DPM, *supra* note 10, at § 8. The Act also provides that "membership in a labor organization may be considered as one factor in evaluating the community of interest of employees in a proposed unit." Therefore, the bargaining units existing at the time the labor-management relations title becomes effective will have a certain advantage of incumbency status. See Personnel Act, *supra* note 1, at §§ 1709(a) & 1711(b). This benefit may be short-lived, however, because of massive restructuring that is likely to occur in "occupational group" compensation bargaining units. *Id.* § 1716(b). See also note 144 and accompanying text *infra*, and proposed amendatory language in Appendix A *infra*, at § 2(t), to adjust these provisions. The amendatory provisions list the factors that qualify employees as "occupational group" units within the general unit determination process. See also Amendments proposed to § 1710(b)(3) (§ 2(p) of amendatory act), which will allow the PERB to consider unit consolidation on its own initiative.

90. The determination of majority status requires "a majority of employees in an appropriate unit who participate in an election . . . or by . . . a card check showing actual membership in the labor organization seeking recognition." Personnel Act, *supra* note 1, at § 1710(a) & (b)(1). See the technical amendment in § 2(p) of the proposed amendatory act.

91. Personnel Act, *supra* note 1, at § 1711(b). See note 89 *supra*.

92. Personnel Act, *supra* note 1, at § 1709(c), provides in pertinent part: "Two (2) or more units for which the labor organization holds exclusive recognition within an agency may be consolidated . . ." (Emphasis added). See note 90 *supra*.

93. The Act provides for representation elections to be conducted by impartial third

employees, based on unit membership or actual membership in the labor organization seeking recognition, participate within a designated bargaining unit.⁹⁴ This provision for "actual majority support," rather than a mere majority of those voting, was in response to the unions' ability both to impose an agency fee upon unit employees who were not members of the union and to bargain for them over compensation matters.⁹⁵

Once an exclusive representative is elected, bargaining will begin between union and management representatives. In the case of executive branch agencies, the mayor will represent management.⁹⁶ Separate authority exists in the Board of Trustees of the University of the District of Columbia and the District of Columbia Board of Education to negotiate separately with their respective employees. Additionally, agencies with independent personnel authority will bargain with their own employees,⁹⁷ possibly resulting in inconsistent personnel rules among these agencies. This result, however, is permitted by the Act.⁹⁸

parties, timetables for issuing decisions, and procedures to hear challenges to such elections. See Personnel Act, *supra* note 1, at § 1710(c), (d), & (e).

94. See note 90 *supra*.

95. See Personnel Act, *supra* note 1, at §§ 1711(a) & 1716, which provides for bargaining concerning "agency shop and other labor organization security provisions" and compensation matters. See notes 120-42 and accompanying text *infra*. See Transcript of the Meeting of the Committee on Government Operations, *reprinted in* LEGISLATIVE HISTORY, *supra* note 18, at 2-314-18 (remarks of Councilmember Marion Barry, Jr.).

96. The mayor will bargain for all subordinate agencies of the District government. Personnel Act, *supra* note 1, at §§ 301(q) & 1701(b). Subordinate agencies are those District governmental entities under the direct supervision of the mayor. See technical amendments to §§ 1702(b) & 1704(a) of the Personnel Act in § 2(j) & (l) of the proposed amendatory act.

97. Personnel Act, *supra* note 1, at §§ 406 & 1701(b), provides for the obligation of good faith bargaining by representatives of agencies with independent personnel authority. See note 82 *supra*. These agencies have been granted such independent authority for reasons of political accountability (*i.e.*, the Board of Education and the Council) or policy reasons (*i.e.*, the District of Columbia Board of Elections and Ethics). See note 96 *supra* concerning technical amendments.

98. In its policy statements, the Personnel Act encourages uniformity between city agencies in the implementation of personnel policy. See Personnel Act, *supra* note 1, at § 103(a)(2). This policy is effectuated by vesting general rule-making authority in the mayor to develop rules and regulations for all employees other than educational employees of the District of Columbia Board of Education and the Board of Trustees of the University of the District of Columbia. *Id.* §§ 401-403. These policies are then carried out on a day-to-day basis by those agencies having independent personnel authority. *Id.* § 406(b). See also note 82 *supra*. These general personnel rules and regulations, however, may be preempted because "rules and regulations issued pursuant to this Act shall not be a bar to collective bargaining during the negotiation process with an exclusively recognized labor organization." Personnel Act, *supra* note 1, at § 404(h). Thus, when appropriate personnel authorities bargain for working conditions under § 1701(b), it is possible for them to agree to differing terms with their respective employee representatives than those negotiated by the mayor with other representatives. Only § 1715(a) creates a method by which the mayor may

Drafters of the Act focused primarily on collective bargaining over terms and conditions of employment,⁹⁹ and included authorization for collective bargaining over matters affecting compensation only as an afterthought.¹⁰⁰ This anomaly will be considered below with the provisions for bargaining over compensation.¹⁰¹ The Act authorizes bargaining concerning all matters not specifically proscribed in the Act and authorizes

hold an agreement until it contains provisions agreeable with city-wide bargaining positions and strategies. Amendatory language is proposed in § 2(s) of Appendix A to rectify this problem, and additional comments are presented at note 148 *infra*.

99. The development of the Personnel Act from one which viewed bargaining over compensation matters as the exception rather than the rule can be seen in the provisions of various sections of title XVII. Section 1702 provides for "bargaining concerning terms and conditions of employment." Personnel Act, *supra* note 1, at § 1702. This provision must be read in conjunction with § 1716, which authorizes "collective bargaining concerning compensation." *Id.* § 1716. Thus, with the development focusing upon bargaining over terms and conditions of employment and not over compensation, the provisions of § 1702(c)(7), also make sense. At a discussion of the Committee on Government Operations regarding impasse resolution machinery, it was suggested that collective bargaining concerning compensation may be a right of firefighters and police officers under § 422(3) of the Home Rule Act. *See generally* note 28 *supra*. One witness suggested that a special provision be included — namely paragraph (7) — to address the matter of compensation bargaining in circumstances where it might be authorized. *See* Transcript of the Meeting of the Committee on Government Operations, *reprinted in* LEGISLATIVE HISTORY, *supra* note 18, at 2-234, -240, -278, & -284 (remarks of Councilmembers Marion Barry, Jr., Arrington Dixon, Hilda Mason, and William Spaulding; Betty Kane, Member, D.C. Board of Education; George Harrod, Director of Personnel, D.C. Government; Bruce Waxman, Esq., Executive Director, BLR; David Ryan, President, Local No. 36, Fire Fighters Association; George Margolies, Legal Counsel to the Superintendent of Schools; and Bruce Comly French, Staff Director and Counsel to the Committee on Government Operations). Nonetheless, it is possible to harmonize the impasse resolution provisions in § 1702(c) with those in § 1113, *see* notes 130-34 *infra*, if one follows the basic tenet of statutory construction holding that full effect should be given to all provisions of an enactment if possible. *See* 2A SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 46.05 (4th ed. 1973). Numerous amendments are presented in the proposed amendatory act, Appendix A *infra*, to harmonize and integrate all bargaining under a single rubric. *See, e.g.*, § 2(c), (i), (j), (o), & (s) of the proposed amendatory act, which modify §§ 1113, 1701(a), 1702, 1709(a), & 1715(a) of the Personnel Act, *supra* note 1.

100. The concept of "50%+ unit members seeking pay bargaining authority" developed immediately prior to the Committee's final action on July 5, 1978. In essence, this scheme provided that when single or multiple bargaining units represented at least one-half of the members of a particular occupational group that desired to bargain over compensation, representatives of the employee organizations could petition the PERB for such bargaining authority. This plan allowed collective bargaining over compensation matters to develop as employee organizations determined that they were equipped to bargain, rather than force immediate consolidation for the purpose of bargaining over compensation after January 1, 1980. The Committee approved the adopted provision by a vote of four to one. *Compare* § 206 of Committee Discussion Draft No. 3, June 2, 1978, *reprinted in* 24 D.C. Reg. 10234 (1978), *with* § 206 of the Personnel Act, *supra* note 1. *See* Transcript of the Meeting of the Committee on Government Operations, *reprinted in* LEGISLATIVE HISTORY *supra* note 18, at 117-18. *See also* Comm. Print No. 4 *supra* note 13, at 245-47.

101. *See* notes 120-42 and accompanying text *infra*.

collective bargaining agreements to preempt statutory or administrative provisions on the same subject matter.¹⁰² The matters not subject to bargaining, however, are multi-fold. These limitations — included within a management's rights clause — prohibit bargaining over day-to-day direction of employees; appointment, promotion, retention and discharge of employees; discharge of employees due to lack of work "or other legitimate reason"; maintenance of the efficiency of the District government operations entrusted to them; determination of the mission and budget of the agency; and actions necessary in exigent circumstances.¹⁰³ These limitations are significant because, in contrast to bargaining in the private sector,

102. The Personnel Act, *supra* note 1, at §§ 1201(a) & 1203(a), states: "PROVIDED, HOWEVER, that the basic work scheduling for all employees in recognized collective bargaining units shall be subject to collective bargaining and collective bargaining agreements shall take precedence over the provisions of this title." It is clear that this proviso was to apply to § 1201(a) in its entirety. The engrossed bill presented for the October 17, 1978 Council meeting included these same words, but the spacing differed so that the proviso appeared to apply only to paragraph (2), which specifically relates only to educational employees (at line 127 of the Engrossed Bill). The same paragraphing error appeared in § 1203(a). Compare these provisions in the Personnel Act, with Comm. Print No. 4, *supra* note 13. The rules of statutory construction will support the preemptive interpretation of this provision. For an example of such interpretations, see Board of Trustees of Santa Maria Joint Union High School Dist. v. Judge, 50 Cal. App. 3d 920, 123 Cal. Rptr. 830 (1975); 2A SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 47.33 (4th ed. 1973).

Other preemption issues also appear in the Act. See, e.g., Personnel Act, *supra* note 1, at § 1301(g), which authorizes collective bargaining with respect to employee training and development programs. Performance rating review systems may be negotiated and will preempt administrative review systems where those systems conflict with a collective bargaining agreement. *Id.* §§ 1401 & 1404(d). Collective bargaining agreements may include grievance provisions which preempt administrative procedures. *Id.* § 1603(d). The Act further authorizes consultation as a method of bargaining with recognized labor organizations over ethics programs for the District government. *Id.* § 1801(b). Collective bargaining over occupational safety and health programs is authorized by § 2004 of the Act. Finally, procedures for "transferring . . . employees identified with the continuing function [of an agency] shall be negotiated with the recognized labor organization." *Id.* § 2401. The proposed amendatory act would consolidate bargaining rights and proscriptions in one section of the Act. See Appendix A *infra*, at § 2(d), (e), (f), (h), (u), & (v).

103. Personnel Act, *supra* note 1, at § 1708(a). This management's rights clause is similar to that found in the federal labor relations program. Other sections of the Personnel Act and Committee Report implicitly suggest that the broad bargaining mandate of § 1708(b) is subject to some limitations. The following matters may not be subjects of bargaining: residency requirements in §§ 801(e) & 801A(d); minimum protections for procedural due process within the reduction-in-force (termination of employees not due to individual employee misconduct procedures in § 2402(d)); and holidays statutorily set in § 1202. See Comm. Print No. 4 *supra* note 13, at 93. By implication, bargaining is nevertheless permitted concerning the unit classification system, although this was probably never intended to be the case. Amendments found in §§ 2(c), (n), & (x) of the proposed amendatory act, Appendix A *infra*, are designed to place all proscriptions concerning bargaining in a single section. Amendments that are proposed to this section of the Act seek to clarify additional circumstances where bargaining is proscribed. See Appendix A *infra*, at § 2(n).

much time will be spent determining whether a matter is subject to bargaining at all.

During the bargaining process, disputes over the scope of bargaining may be resolved by the PERB.¹⁰⁴ Particular matters subject to collective bargaining may be resolved by a variety of impasse resolution devices, including "final best offer binding arbitration item by item" for non-compensation matters.¹⁰⁵ Because of the limitations upon the PERB's direct involvement in the fact finding, mediation, and arbitration process,¹⁰⁶ however, the cryptic statement in the Personnel Act that "impasse resolution procedures may be conducted by the Board"¹⁰⁷ should be read narrowly. The PERB's actions, therefore, must be limited to requesting an injunction,¹⁰⁸ or assisting in the assignment of arbitrators.¹⁰⁹ Whatever the outcome of the negotiations, compliance with the arbitrator's award is dependent upon "the ability of the District to comply with the terms of award."¹¹⁰ When coupled with the management's rights clause restricting negotiation over an agency's budget,¹¹¹ this provision of the Act provides management with significant leverage in the collective bargaining process — subject only to the obligation to bargain in good faith.

Agencies' fees — those fees required to be paid by nonunion member unit employees — may be negotiated between management and the union. Unlike a union member's "dues checkoff," they apparently may be deducted from a nonunion member's paycheck without his or her express

104. See note 51 *supra*. Section 502(e) requires a determination by the PERB regarding the scope of collective bargaining in "disputed cases," while § 1702(b)(5) merely speaks of "the scope of bargaining." Although the specific provision will govern, see note 51 *supra*, it is uncertain whether this distinction will have any practical effect.

105. Personnel Act, *supra* note 1, at § 1702(c)(7). See also note 99 *supra*.

106. See notes 51-53 *supra*.

107. Personnel Act, *supra* note 1, at § 1702(d).

108. *Id.* Cf. *id.* §§ 502(m), 1702(c)(4), & 1713(b). See note 42 *supra*.

109. Personnel Act, *supra* note 1, at § 502(d), instructs the PERB to provide arbitrators who are selected at random.

110. *Id.* § 1702(d)(2). Other considerations of an arbitrator will be existing laws, rules and regulations (although, note the preemption provision in § 404(h), discussed at note 98 *supra*), the maintenance of public health, safety and welfare, and the maintenance of personnel policies that are fair and comport with the provisions of the Personnel Act.

111. *Id.* § 1708(a)(5). Other jurisdictions have noted that firm adherence by management to a position of financial scarcity does not constitute bad faith bargaining. See, e.g., Pennsylvania Labor Rel. Bd. v. Uniontown Area School Dist., 28 Pa. Commw. Ct. 61, 367 A.2d 738 (1977). See also Transcript of the Meeting of the Committee on Government Operations, reprinted in LEGISLATIVE HISTORY, *supra* note 18, at 2-271 & -282 (remarks of Councilmember Marion Barry, Jr. and Bruce Comly French, Staff Director and Counsel to the Committee, concerning the need to establish a maximum standard for arbitrators' awards.)

permission.¹¹²

V. UNFAIR LABOR PRACTICES AND LABOR ORGANIZATION STANDARDS OF CONDUCT

Investigation and resolution of unfair labor practices are the most important provisions in any labor relations statute because their enforcement tests the success of the collective bargaining process. In the Personnel Act, management is expressly prohibited from interfering with or infringing upon rights guaranteed to employees, assisting in the formation of "company unions,"¹¹³ providing financial support to labor organizations other than time off for union activities, discriminating against employees for union activities, and refusing to bargain in good faith with labor representatives.¹¹⁴ The Act provides similar protections for the District government against improper union activity, specifically prohibiting strikes or threats against others to act illegally on behalf of a labor organization.¹¹⁵ The Act forbids public sector strikes, authorizing termination of employees for participation in a strike¹¹⁶ and prosecution under federal criminal

112. The Personnel Act, *supra* note 1, at § 1707, expressly provides that "dues deductions" may only be made "from the salaries of those employees who authorize the deduction of said dues." Ironically, § 1707, provides that the "service [agency] fees may be deducted from an employee's salary by the employer if such a provision is contained in the bargaining agreement." Thus, the non-union member's payment of fees to the exclusive representative is more certain than in the case of an actual union member. The negotiation of an agency fee, however, is not a new concept in the District of Columbia. Although the Board of Education has the authority, it has chosen not to negotiate an agency fee. Letter from George Margolies, Esq. to Bruce Comly French, Staff Director and Counsel, Committee on Government Operations, *supra* note 39, at 5. See a technical amendment presented in § 2(m) & (q) of the proposed amendatory act, Appendix A *infra*.

The Committee's Report noted its full support for special treatment of political contributions by unions. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); Comm. Print No. 4 *supra* note 13, at 104-05. Special treatment should also apparently be given to employees who object to agency fees on religious grounds. Cf. Personnel Act, *supra* note 1, at § 701(b), (authorizing significant governmental adjustments to honor religious exercises). See *Southern Pac. Transp. Co. v. Burns*, 17 Fair Empl. Prac. Cas. (BNA) 1648 (9th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3457 (1978).

113. Company unions are management-inspired, and management-dominated organizations designed to undermine the efforts of bona fide labor organizations to represent employees interests. Cf. 29 U.S.C. § 158(a)(2) (1976).

114. Personnel Act, *supra* note 1, at § 1704(a). Language specifically identifying management representatives in the District is proposed in § 2(l) of the proposed amendatory act, Appendix A *infra*.

115. *Id.* § 1704(b) lists practices considered to be unfair if engaged in by labor organizations or those operating on their behalf. Greater detail was found in the preexisting administrative regulations. Therefore, the PERB presumably will issue rules and regulations to develop internal operating procedures to implement these provisions.

116. The Committee on Government Operations gave considerable attention to authorizing a public employee right to strike, as in Alaska, Hawaii, Minnesota, Montana, Oregon,

law.¹¹⁷

In addition to these unfair labor practice provisions, the Act also provides aid to individual employees. Employees are guaranteed the right to present grievances directly to management without the intervention of a labor organization.¹¹⁸ Standards of labor organizations' conduct established by the Act ensure that these associations operate democratically.¹¹⁹ These provisions caused little controversy at the drafting stage, and generally track federal and state laws concerning organizational rights of public employees.

VI. COLLECTIVE BARGAINING IN COMPENSATION MATTERS

Prior to the Personnel Act, collective bargaining over compensation was allowed for only three groups of employees: fire fighters, police officers, and, in more limited circumstances, sanitation workers.¹²⁰ During the legislative development of the Act's compensation-setting scheme, bargaining over compensation was envisioned only for these three groups. However, as a result of the initiative of recognized employee organizations, various provisions were suggested to expand compensation bargaining to other

Pennsylvania, Rhode Island and Vermont, but settled instead for a strike prohibition similar to existing law. See Comm. Print No. 4, *supra* note 13, at 101-03. Accord, DPM, *supra* note 10, at §§ 6 & 18. The strike ban simply states: "It shall be unlawful for any District government employee or labor organization to participate in, authorize or ratify a strike against the District." Personnel Act, *supra* note 1, at § 1705. The Act, moreover, provides that it is an unfair labor practice for "[E]mployees, labor organizations, their agents or representatives" to engage in a strike "or any other form of unauthorized work stoppage or slowdown" or in "a strike or refusal to handle goods or perform services . . . with the object of forcing . . . any person . . . to recognize . . . a labor organization not recognized pursuant to the procedures of this [act]." *Id.* § 1704(b)(4) & (5). The Act also provides that involvement in a strike is grounds for dismissal from government employment. *Id.* § 1601(d)(17).

117. The Act provides for the continued application of the provisions of 18 U.S.C. § 1918 (1976) "insofar as they affect employees of the District of Columbia government . . .," including criminal penalties for engaging in a strike. Personnel Act, *supra* note 1, at § 3206(a). The provisions of 18 U.S.C. § 201 (affecting bribery and conflicts of interest), § 1913 (lobbying with appropriate funds), § 2101 (engaging in a riot), and §§ 2381-2385 (engaging in subversive activities) (1976), will also continue to apply to employees of the District government.

118. Personnel Act, *supra* note 1, at § 1706(b), provides that "an individual employee may present a grievance at any time to his or her employer without the intervention of a labor organization . . .," provided that union representatives may be present and that the resolution of such a complaint is not considered to be relevant to other grievances which are presented.

119. *Id.* § 1703, details the standards of conduct required of labor organizations, and orders the submission of certain reports and documents to the PERB upon certification as an exclusive representative.

120. See notes 28-31 and accompanying text *supra*.

employee groups.¹²¹ Finally, in July, 1978, the Council committee adopted a plan providing that collective bargaining over compensation for all employees in undefined "occupational groups"¹²² would become part of the proposed Act by January 1, 1980.¹²³

Title XI, concerning "Classification and Compensation," provides an elaborate set of principles classifying the positions of government employees and developing compensation policies.¹²⁴ Whether compensation is set by an act of the Council under the statutory guidelines of the Personnel Act or collectively bargained for under section 1113 of Title XI, the principles of compensation setting remain the same.¹²⁵ Furthermore, the entire range of compensation benefits are negotiable in the bargaining process.¹²⁶

121. See note 100 *supra*.

122. The concept of occupational groups, while not foreign to personnel management, is one of the more cryptic provisions in the Personnel Act. The DPM *supra* note 10, at 5-6, defines an occupational group as "a major subdivision of the General Schedule embracing a number of series of classes in related occupations, professions, or fields. For example, positions in the various engineering series comprise the GS-800 Engineering and Architecture Group." The concept of occupational groups as cutting across agency lines was suggested as early as April 7, 1977. Representatives of the International Personnel Management Association (IPMA) noted that all employees in the same occupational group with the same salaries should be assigned into the same unit regardless of the agency to which such workers are assigned. Comm. Print No. 4 *supra* note 13, at 20. In comments submitted on September 7, 1977, the BLR suggested four possible approaches to unit determination for the negotiation over compensation matters: (1) four units such as professional, clerical, public safety, and production and maintenance (Canadian model); (2) coalition council bargaining with separate models (Tennessee Valley Authority model); (3) ad hoc (the bane of D.C. Personnel Department); or (4) a certain specified percentage, such as 40% of a particular group of employees (New York City, Baltimore City and Prince Georges County, Maryland models). Statement of James Harkless, Chairman, BLR (Sept. 7, 1977), *reprinted in* Personnel Distribution No. 14, (Sept. 7, 1977). All of the information cited above was available to the Committee in its deliberations. The exact nature of the Committee's view is, however, uncertain. The only firm conclusion that one may reach is that fire fighters and police officers should not be merged into one unit to meet the test of an "occupational group." Comm. Print No. 4 *supra* note 13, at 107.

123. Personnel Act, *supra* note 1, at § 1716.

124. *Id.* §§ 1101-1104.

125. *Id.* § 1113. This section provides that the general pay-setting provisions of § 1103 "shall apply to compensation set under the provisions of this section." These provisions generally follow existing federal pay provisions and assure equal pay for substantially equal work regardless of the agency to which the employee is assigned. This principle is significant in that it will tend to equalize pay scales in District agencies where a myriad of pay systems currently exists. Furthermore, although the differences between the federal scheme at 5 U.S.C. §§ 5301-5308 (1976) and § 1103(a)(1) are slight, they do exist, and grant greater flexibility to management in finding more diverse work places to serve as bases of compensation comparisons. *But see* Transcript of the Meeting of the Committee on Government Operations, *reprinted in* LEGISLATIVE HISTORY, *supra* note 18, at 48 (comments of Charles Braxton, Legislative Representative, Washington Teachers Union).

126. The Personnel Act, *supra* note 1, at § 1113(a), provides that "salary, wages, health

Contracts with new compensation provisions will be negotiated as existing agreements expire.¹²⁷ Ultimately, however, a negotiation timetable that is linked to the District's budgetary cycle is necessary.¹²⁸ Labor and management teams will conduct annual studies to analyze compensation packages of similarly situated government and private-sector workers in comparable cities, providing data for the development of negotiating strategies of both labor and management.¹²⁹

The Act's time limit governing negotiations over compensation matters is strict,¹³⁰ and "automatic impasse" procedures become operational at the

benefits, within-grade increases, overtime pay, education pay, shift differential, premium pay, hours and any other compensation matters" are negotiable. Section 1113(k), however, provides that any agreements concerning life and health insurance benefits or retirement require the affirmative enactment of legislation by the Council. *Id.* § 1113(k). *See* note 146 and accompanying text *infra* regarding the author's proposal to defer such bargaining rights in the early stages of collective bargaining. The apparent inconsistency between permissible negotiation over "health benefits" and the provision that such benefits may only be agreed to by "act of the Council" will likely be interpreted in favor of the latter provision, requiring Council approval.

127. Personnel Act, *supra* note 1, at § 1113(b), provides for the initiation of a compensation study "[n]o earlier than one hundred and fifty (150) days before the expiration of any existing negotiated agreement between the parties." Thus, the initial emphasis in the PERB's formative period will be on existing bargaining units having exclusive representatives. *See* notes 144 and 147-48 and accompanying text *infra*, concerning the author's proposal to establish a better timetable for such compensation bargaining.

128. For a thorough description of the District government's budgetary cycle, *see generally* D.C. CODE ANN. §§ 1-144(f) & 47-221 to -280 (1973 & Supp. 1978). The Committee's reported measure of July 5, 1978, set September 1, 1979, and each subsequent year as the annual cycle for bargaining, which took full account of the unpredictability of the District's process. *Compare* Comm. Print No. 4, note 13 *supra* with note 127 *supra*. The Personnel Act *supra* note 1, at § 1113(l), does provide, however, for a cycle envisioning the formation of new bargaining units. Furthermore, § 1113(j) of the Act provides that all "settlement, including an arbitrator's award, shall be included in either the District budget request or in any supplemental budget request and shall be fully supported by the District [officials] by every reasonable means before Congressional bodies." Thus, the Council fully recognized that out-of-cycle bargaining agreements were potential eventualities under the city's budget cycle, and that supplemental budget requests might be required.

129. Within the context of compensation policies set out in § 1103 for pay set by act or by agreement discussed in note 125 *supra*, "management shall begin a thorough study of the compensation being paid to comparable occupational groups of employees in other jurisdictions in the Washington . . . area and the nation's thirty largest cities by population." Personnel Act *supra* note 1, at § 1113(b). The fairest harmonization of these two statutory provisions would be to honor the greater detail required by § 1113.

130. The Personnel Act, *supra* note 1, at § 1113(c), (d), & (e), sets strict timetables for the collective bargaining over compensation. Negotiations between the parties continue in the face of exacting timetables over a period of 180 days. If agreement does not occur within this period, an impasse shall be deemed to have occurred and an impartial board of arbitration shall be appointed by PERB to "investigate the . . . issues involved in the dispute . . . and issue a written award . . . final and binding upon the parties to the dispute." *Id.* § 1113(e). *See also* note 131 *infra*.

end of 180 days.¹³¹ An impasse may be resolved through any impasse resolution device authorized in the Act, including the "last best offer of each party."¹³² It is assumed, therefore, that an arbitrator would recommend a single package for approval and encourage multi-year contracts.¹³³ Although the arbitrator's award is not binding on the Council, the Council may only reject a proposed award by a two-thirds vote of its members.¹³⁴

Impasse resolution tools concerning agreements involving terms and conditions of employment are different from those affecting compensation bargaining agreements.¹³⁵ The compensation impasse resolution machinery focuses on strict timetables, while the resolution of impasses concerning bargaining over terms and conditions of employment is structured along an "escalation scale" of lesser to greater third-party interventions and sanctions. These differing perspectives may be harmonized by reading the "escalation scale" of remedies as applying within the "time constraints" of bargaining impasses concerning compensation.¹³⁶ The proposed amendatory language will clarify this relationship, and further authorize "item by item" arbitration in compensation matters, as well as those affecting terms and conditions of employment.¹³⁷

131. The Personnel Act, *supra* note 1, at § 1113(e), sets the stage for the collective bargaining process and also the manner in which impasses concerning compensation are to be declared and resolved. Section 1113(e)(5), authorizing the payment of a "factfinder, mediator, and any members of the Board of Arbitration," suggests that various impasse resolution devices are available at the option of the PERB within the time frames set forth in the Act. *Accord, id.* § 1702(c). *See also* notes 51-54 and 106-11 *supra*.

132. The Personnel Act, *supra* note 1, at § 1113(e)(2) & (3), provides "the last best offer of each party shall be the basis for such automatic impasse arbitration." This provision would continue to allow "final best offer binding arbitration item by item on non-compensation matters." *Id.* § 1702(c). *See also* notes 99 *supra* and 137 *infra*.

133. Since item-by-item binding arbitration is not available for resolving compensation impasses, *see* Personnel Act *supra* note 1, at § 1702(c)(6) & (7), presumably the arbitrator would have to recommend the final best offer of either management or labor. *See* note 135 *infra* and Personnel Act *supra* note 1, at § 1113(f), which provides that "multi-year compensation agreements are encouraged. No compensation agreement shall be for a period of less than three (3) years."

134. The Personnel Act, *supra* note 1, at § 1113(i), provides that "[a]ll labor relations settlements negotiated or otherwise determined pursuant to this section shall become effective by their terms, unless the Council rejects such settlement by a two-thirds (2/3) vote of its members within sixty (60) calendar days of its submission by the Mayor."

135. *See* notes 104-11 and accompanying text *supra*.

136. *See* note 131 *supra*.

137. *See* Appendix A *infra*, at §§ 2(s) & 4. Amendments to §§ 1113 & 1715(b) of the Personnel Act are designed to integrate the two negotiation and impasse resolution schemes, so that all bargaining will occur in a unified fashion. The author has suggested eliminating all separate treatment for compensation bargaining by eventually repealing § 1113. Council review would then occur as provided under the proposed amendatory language to § 1715(b). *See* Appendix A *infra*, at § 2(s).

The identification of appropriate units for compensation negotiations triggers the bargaining process outlined above.¹³⁸ Labor organizations representing "occupational groups,"¹³⁹ such as police officers or fire fighters,¹⁴⁰ are authorized to negotiate compensation. If the PERB determines that a recognized labor organization does not represent an appropriate occupational group for the purposes of compensation bargaining, it may then authorize bargaining by multiple employer or employee groups.¹⁴¹

With respect to the time of bargaining, the mayor and the two educational boards are required to negotiate working conditions and compensation agreements concurrently.¹⁴² The relevant provisions suggest that no

138. The identification of an appropriate bargaining unit for compensation bargaining is controlled by the Personnel Act, *supra* note 1, at § 1716(b), which states:

The determination of an appropriate unit for the purpose of negotiations concerning compensation shall not require a request from a labor organization. In determining appropriate bargaining units for negotiations concerning compensation, the Board shall authorize broad units of occupational groups so as to minimize the number of different pay systems or schemes. The Board may authorize bargaining by multiple employer or employee groups as may be appropriate.

The inference is clear that these bargaining units are somehow different than the terms and conditions bargaining unit authorized under § 1709 of the Personnel Act. *See* notes 80 & 98-112 and accompanying text *supra*. Furthermore, the ability to create units without a request from a labor organization is at variance with the procedures generally provided in the Act for labor and management to determine appropriate units without resort to the PERB. *See* notes 44-47 and accompanying text *supra*. Section 1113(b), however, when read together with § 1113(l), suggests that, initially, collective bargaining over compensation will be with those exclusive representatives having "expiring contracts." Certainly, the determination of appropriate "occupational groups," *see* note 139 *infra*, is not a process that is likely to occur with alacrity before the PERB. Thus, it is essential that proposed amendatory language to these provisions be adopted, so that the relationship of existing bargaining units and those designated under § 1716(b) is clear. *See* Appendix A *infra*; notes 89-90 & 99 *supra*; and 144 & 147-48 *infra*.

139. Personnel Act, *supra* note 1, at § 1716(b). *See also* note 122 *supra*.

140. Comm. Print No. 4 *supra* note 13, at 107.

141. Personnel Act, *supra* note 1, at § 1716(b). *See also* note 138 *supra*.

142. The Personnel Act, *supra* note 1, at § 1113(l), requires that "[t]he Mayor shall negotiate agreements concerning working conditions at the same time as he or she negotiates compensation issues." Thus, in the case of an exclusive representative authorized to bargain compensation matters under § 1716 with the Mayor, the provisions of § 1113(l) may be given life in that the bargaining process can occur at the same time and at the same table. In the case of the two educational boards, §§ 1113(a) & 1716(a) are in partial conflict: the former section speaks of the educational boards as negotiating with all of their employee organizations, while the latter provision only authorizes bargaining with their "educational employees." This variation, while not generally significant, would exclude certain groups of persons employed by the Board of Education and the University of the District of Columbia who perform jobs generally performed by city government employees and not unique to an educational institution — such as cooks, secretaries, etc. (Educational employee is defined in § 301(f) of the the Personnel Act). *But see* proposed amendatory language affecting §

statutory problem exists for negotiations by the independent personnel authorities concerning terms and conditions of employment because the independent personnel authorities are not authorized to bargain over compensation. The language of the Act is confusing, however, if the mayor's "compensation" bargaining units differ from his "working condition" bargaining units. This apparent confusion may be resolved by interpreting the statutory language to mean bargaining occurring at the same time, but as part of separate negotiations. While this construction of the provisions creates order within ambiguous provisions, it is not likely to affect the Council's objective of minimizing the number of disparate pay systems. Nonetheless, because the mayor will bargain for all executive branch employees, he can exact tradeoffs between working condition and compensation matters.

The irony of this bifurcated statutory scheme is that without the integration of the compensation and working conditions bargaining, as envisioned by the proposed amendments, and the eventual repeal of the separate section 1113 which authorizes the separate process for bargaining matters affecting compensation, the city managers are likely to find themselves bargaining with increasingly fragmented groups over terms and conditions of employment. Compensation bargaining, tied to larger

1715(a) in § 2(s) of Appendix A *infra* which authorizes the educational boards to bargain for their educational employees, while authorizing the mayor to bargain for all other city employees. The policy resolution of bargaining by noneducational employees with the two educational boards could certainly be resolved to the contrary of this amendment. This resolution appears to track most closely that adopted by the Council. At a minimum, the mayor and the two educational boards are directed to bargain compensation at the same time as working condition contracts.

Bargaining by agencies with independent personnel authority is not subject to the same time constraints as bargaining by the mayor and the educational boards. In discussing these provisions, Councilmember Marion Barry, Jr. indicated his belief that the mayor would bargain compensation for all city employees, except for the limited class of educational employees engaged by the two educational boards. *See* Transcript of the Meeting of the Council, *reprinted in* LEGISLATIVE HISTORY, *supra* note 18, at 3-5. This understanding is certainly not consistent with the plain meaning of the legislative enactment. If an important policy objective is to minimize the number of disparate pay systems, *see* note 19 *supra* (statement of Mayor Washington), then the most reasonable interpretation would be that the mayor should bargain for all employee groups within the context of a bargaining council. The educational boards could bargain with their educational employees on all matters, assuming that the PERB treated each set of educational employees as an appropriate "occupational group" for compensation bargaining. Finally, with regard to non-educational employees and those engaged by an agency having independent personnel authority, the mayor could bargain compensation matters in conjunction with the agencies' bargaining of terms and conditions of employment in a council-like arrangement. This final proposal might produce some differences in individual contracts, but the PERB would be within its authority to refuse to vest compensation bargaining in the heads of agencies with independent personnel authority. *See* Personnel Act *supra* note 1, at § 1113(a); note 98 *supra*.

"occupational groups," will be more manageable, but the trade-offs and integration of these two processes will be lost to management and inure to the benefit of labor organizations. Management will tend to compete with itself, for example, by having the D.C. General Hospital Commission bargain with employees over matters affecting working conditions, while the same employees will bargain with the mayor over compensation.

VII. CONCLUSION

The District of Columbia Government Comprehensive Merit Personnel Act of 1978 represents a major step toward the development of a modern system of public sector labor relations for the employees of the District government. In a bill of such complexity, it is not surprising that many provisions are somewhat contradictory; however, in several sections, provisions should be amended to avoid litigation concerning the Council's intent.

The implementation task force should place the highest priority on recommending the following amendments to the Act to the Council:¹⁴³

1. The implementation task force should seek to defer collective bargaining concerning compensation until January 1, 1981. Additional time is necessary to form occupational group bargaining units appropriate for collective bargaining over compensation.¹⁴⁴

2. The implementation task force should delay for one year the preemption of the former administrative rules so that greater attention can be given to the negotiations affecting terms and conditions of employment in the first bargaining cycle under the Act.¹⁴⁵

3. The implementation task force should seek a delay until January 1, 1982 of the right to bargain over employee benefit programs, such as life and health insurance and retirement, in order to allow the appropriate studies to be undertaken before bargaining commences.¹⁴⁶

143. For a collection of such proposed amendments, see Appendix A *infra*.

144. Currently, the District government bargains with 64 exclusive representatives. Most of these units are only authorized to bargain terms and conditions of employment. An additional one year period of time will enable the PERB to constitute bargaining units that recognize the mandate concerning compensation bargaining. Proposed amendatory language is suggested in Appendix A *infra*, at § 2(t), that expressly authorizes and creates general guidelines for other units to be created. See note 122 *supra*.

145. One of the principal objectives of the Personnel Act was to bring order to the existing personnel practices and rules within the District government. Delaying the preemption of previously enacted administratively-adopted rules and regulations to implement the Personnel Act, when the new rules are themselves in the process of being proposed and adopted, will aid in the underlying policy objective, and will have a minimal impact upon the collective bargaining process.

146. See note 145 *supra*.

In lieu of these amendments, the following steps may be taken by the PERB to minimize disruption in the collective bargaining process:

1. Issue an order authorizing police officers, fire fighters, and sanitation workers to organize as appropriate occupational groups for the purposes of negotiating compensation. These are the only employee groups that currently have a right to bargain over compensation. Both management and labor, therefore, are equipped to continue such a bargaining relationship.¹⁴⁷

2. Promulgate on its own initiative or in response to a petition for rule making¹⁴⁸ from the mayor or a labor organization the guidelines for appropriate occupational groups, or design multiple employer and employee groups for the purpose of compensation negotiations. Bargaining for all executive departments should be undertaken by the mayor; for all educational employees of the two educational boards, by the respective boards; and, in the case of non-educational employees of the educational boards and employees of the independent agencies, the mayor should be designated as the primary negotiator with the head of the agency having a greater role in bargaining over specific terms and conditions of employment.

3. Direct that impasse resolution devices follow the "escalation scale" of remedies found in title XVII for both compensation and terms and conditions bargaining, thus allowing binding third-party arbitration in both types of cases. The PERB should also follow the section 1113 impasse resolution timetable for both compensation and terms and conditions bargaining where both matters are subjects of bargaining within the same time frame.¹⁴⁹

These proposals will ensure an effective start to the District's experiment with public sector collective bargaining and minimize problems created by the Act.

147. These are the only employee groups that have any right to bargain over pay, so both labor and management are best equipped to continue such a bargaining relationship. See notes 28 & 31 and accompanying text *supra*.

148. D.C. CODE ANN. § 1-1505(a) & (b) (1973 & Supp. 1978) authorizes rule-making by the agency itself or by a person who requests the agency to adopt a rule.

149. See notes 51, 106-09 & 130-37 *supra*. Proposed amendatory language is shown in Appendix A *infra*.

APPENDIX A*

This proposed amendatory act will be structured in a manner to be usable by a reader who is unfamiliar with the legislative drafting style of the Council of the District of Columbia, which normally merely notes changes, without inclusion of original text in the proposed act.

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To amend the District of Columbia Government Comprehensive Merit Personnel act of 1978 to modify provisions affecting the labor-management relations program; to adjust timetables; to clarify and make consistent provisions of the act; and for other purposes.

Councilmember _____ introduced the following bill which was referred to the Committee on _____

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Personnel Act Amendments Act of 1979".

Comment: This section states the short title of the Act, reflecting its amendatory nature.

Sec. 2. The District of Columbia Government Comprehensive Merit Personnel Act of 1978, D.C. Law No. 2-139, is amended as follows:

(a) Section 501 is amended as follows:

Sec. 501. *Establishment of Board*

(a) There is established a Public Employee Relations Board (hereinafter referred to in this title as the "Board") consisting of five (5) members, not otherwise in the employment of any labor organization granted exclusive recognition under this act or the District of Columbia government: EXCEPT, that members of the Board of Labor Relations established by Commissioner's Order 70-229, may be appointed to the Public Employee Relations Board. The members shall be appointed NOMINATED by the Mayor within sixty (60) days after the effective date of this subsection.

* * * * *

* Material in this appendix denote amendments proposed by the author.

(e) The Mayor may ~~remove~~ INITIATE THE REMOVAL OF any member of the Board who engages in any activity prohibited by subsection (g) of this section or for repeated failures to attend Board meetings, and appoint a new member in accordance with the provisions of subsection (c) of this section to serve until the expiration of the term of the member so removed. When the Mayor believes that any member has engaged in any such activity, he or she shall initiate an action in the Superior Court of the District of Columbia in accordance with the provisions of section 145(n) of the District of Columbia Court Reform and Criminal Procedure Act (84 Stat. 562; D.C. CODE ANN., §§ 16-3501 to -3548) to remove such member.

(b) Section 502 is amended as follows:

* * * * *

(d) ~~resolve bargaining impasses through fact finding, final and binding arbitration or other methods agreed upon by the parties as approved by the Board and to, OR IF APPROPRIATE, remand disputes if it believes further negotiations are desirable. Arbitration shall not be conducted by the Board itself, and the Board shall provide arbitrators selected at random from a panel or list of arbitrators maintained by the Board and consisting of persons agreed upon by labor and management.~~

* * * * *

(f) ~~consider appeals from arbitration awards pursuant to a grievance procedure:~~ PROVIDED, HOWEVER, that such awards may be reviewed only if the arbitrator was without, or exceeded, his or her jurisdiction; the award on its face is contrary to law and public policy; or was procured by fraud, collusion, or other similar and unlawful means: PROVIDED, FURTHER, That the provisions of this subsection shall be the exclusive method for reviewing the decision of an arbitrator concerning a matter properly subject to the jurisdiction of the Board, notwithstanding any provisions of the District of Columbia Uniform Arbitration Act (D.C. Law 1-117; D.C. Code, Appendix, Title 16);

* * * * *

(l) The Board may hear any matter brought to it under this Act by a three (3) member panel. An appeal from a decision of any such three (3) member panel may be taken to either the full Board or the Superior Court of the District of Columbia at the option of any adversely affected party, ~~and if not taken within one hundred twenty (120) days the decision shall be final.~~ If an appeal is taken directly to the Superior Court of the District of Columbia, the decision of a three (3) member panel, for purposes of such appeal, shall be considered as the final decision of the Board. If an appeal is taken from a decision of a three (3) member panel to the full Board, the decision of the three (3) member panel MAY be stayed pending a final decision of the Board. Upon a vote of the majority of its members, the Board may hear *de novo* all issues of fact or law relating to an appeal

of a decision of the three (3) member panel, except the Board may decide to consider only the record made before such three (3) member panel. A final decision of the full Board, relating to an appeal brought to it from a three (3) member panel, shall be appealable to the Superior Court of the District of Columbia. Upon reviewing the final decision of the Board, the court shall determine if it is supported by substantial evidence and not clearly erroneous as a matter of law. A DECISION OF A PANEL OR THE BOARD SHALL BECOME FINAL WITHIN TEN (10) DAYS IF NO APPEAL IS TAKEN FROM SUCH DECISION.

* * * * *

(n) ~~retain independent legal counsel to assist in Board activities when the District government is a party to the Board's proceedings or in any other situations as the Board deems appropriate;~~

Comment: These four amendments to Section 502 serve the following purposes. The first amendment seeks to clarify the apparent conflict between the provisions of Sections 502(d) & (m) and title XVII. All discussion of the impasse resolution process will now be placed within Title XVII. *See* note 51 *supra*. The second amendment broadens the reach of the PERB's authority to review awards beyond those contained in grievance agreements alone. This amendment conforms with the policy objectives in Section 1113 concerning compensation negotiation, and standardizes the procedures for the PERB under the Act. *See* note 56 *supra*. The third amendment clarifies the ambiguity in the existing Act concerning the "120 day panel" appeal period. The ten day period now proposed will encourage the finality of Board (or panel) decisions. Further, parties dissatisfied with the PERB panel decisions will be forced to seek judicial review, or convince the PERB that a stay should be granted for an *en banc* hearing. *See* notes 66, 67, 73 & 74 *supra*. The fourth amendment suggests that the PERB *should* retain its own independent legal counsel. This amendment is recommended to assure PERB independence, although the wording of the provision currently in force suggests a similar objective. *Cf.* D.C. CODE ANN. § 1-1151(b) (1973 & Supp. V 1978). (The Board may presently appoint a general counsel to serve at its pleasure notwithstanding any other provisions of title 5.)

(c) Section 1113 is amended as follows:

Sec. 1113. *Collective Bargaining Concerning Compensation*

Collective bargaining concerning compensation is authorized as provided in sections 206 and 1716 of this Act. Such compensation bargaining shall preempt other provisions of Title XI of this Act except as provided in this section. The principles of sections 1101 THROUGH 1103 of this title *AFFECTING CLASSIFICATION AND* compensation *SHALL APPLY TO COMPENSATION* set under the provisions of this section.

Comment: This amendment reflects the Council policy objective of not bargaining over classification principles. *See* note 103 *supra*.

(d) Section 1201 is amended as follows:

Sec. 1201. *Hours of work*

(a) A basic administrative workweek of forty (40) hours is established for each full-time employee and the hours of work within that workweek shall be performed within a period of not more than six (6) of any seven (7) consecutive days: EXCEPT, that

(1) the basic workweek for uniformed members of the Firefighting Division of the District of Columbia Fire Department shall not exceed forty-eight (48) hours and the Division shall operate under a two (2) shift system with all hours of duty of either shift being consecutive; and

(2) the basic workweek and hours of work for all employees of the Board of Education and the Board of Trustees of the University of the District of Columbia shall be established under rules and regulations issued by the respective Boards: ~~PROVIDED, HOWEVER, that the basic work scheduling for all employees in recognized collective bargaining units shall be subject to collective bargaining, and collective bargaining agreements shall take precedence over the provisions of this title.~~

Comment: This amendment, and those contained in subsections (e)-(h), (u), and (v) are conforming and technical, to assure that the parameters of the collective bargaining program are set within the provisions of Title XVII. *See* note 102 *supra*.

(e) Section 1203 is amended as follows:

Sec. 1203. *Leave*

(3) All employees shall be entitled to earn annual and sick leave as provided herein, except:

(1) educational employees under the Board of Education or Board of Trustees of the University of the District of Columbia. The leave system for such employees shall be established by rules and regulations promulgated by the respective Boards;

(2) an intermittent employee who does not have a regularly scheduled tour of duty;

(3) elected officials;

(4) members of Boards and Commissions whose pay is fixed under section 1108 of this Act; or

(5) a temporary employee appointed for less than ninety (90) days: ~~PROVIDED, HOWEVER, that leave for all employees included within recognized collective bargaining units shall be subject to collective bar-~~

~~gaining and collective bargaining agreements shall take precedence over the provisions of this title.~~

(f) Section 1401 is amended as follows:

Sec. 1401. *Performance-Rating Plans*

For the purpose of recognizing the merits of employees and their contributions to efficiency and economy in the District, the Mayor, the District of Columbia Board of Education, and the Board of Trustees of the University of the District of Columbia (for non-educational employees under its jurisdiction) shall establish and use a performance-rating plan for evaluating the work performance of employees under their respective jurisdictions. ~~The performance rating plan shall be established after negotiation with appropriate labor organizations.~~

(g) Section 1603 is amended as follows:

* * * * *

(d) Any system of grievance resolution or review of adverse actions negotiated between the District and a labor organization shall take precedence over the procedures of this title for members of a labor organization in a bargaining unit. Any adverse action to be effected may only be for causes as specified in this title. ~~If an employee does not pay dues or a service fee to the labor organization, he or she shall pay all reasonable costs to the labor organization incurred in representing such employee.~~

(h) Section 1701 is amended as follows:

Sec. 1701. *Policy*

The District of Columbia government finds and declares that an effective collective bargaining process is in the general public interest and will improve the morale of public employees and the quality of service to the public.

(a) Each employee of the District government has the right, freely and without fear of penalty or reprisal: (1) to form, join and assist a labor organization or to refrain from this activity; (2) to engage in collective bargaining concerning terms and conditions of employment AND MATTERS AFFECTING COMPENSATION, as may be appropriate under this law and rules and regulations, through a duly designated majority representative; and (3) to be protected in the exercise of these rights.

(b) The Mayor or appropriate personnel authority, including his or her or its duly designated representative(s) (HEREINAFTER, REFERRED TO AS MANAGEMENT), shall meet at reasonable times with exclusive employee representatives to bargain collectively in good faith.

~~(c) Subsection (a) of this section does not authorize participation in the~~

~~management of a labor organization or activity as a representative of such an organization by a supervisor, or management official or by an employee when the participation or activity would result in a conflict of interest or otherwise be incompatible with law or with the official duties of the employee. "Supervisor" means an employee having authority, in the interest of an agency, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to evaluate their performance, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment. The definition of supervisor shall include an incumbent of a position which is classified at a level higher than it would have been had the incumbent not performed some or all of the above duties.~~

SUBSECTION (A) OF THIS SECTION DOES NOT AUTHORIZE PARTICIPATION IN MANAGEMENT OF A LABOR ORGANIZATION OR ACTIVITY AS A REPRESENTATIVE OF SUCH ORGANIZATION BY A MANAGEMENT OFFICIAL OR BY AN EMPLOYEE WHEN THE PARTICIPATION OR ACTIVITY WOULD RESULT IN A CONFLICT OF INTEREST OR WOULD BE OTHERWISE INCOMPATIBLE WITH THE LAW OR THE OFFICIAL DUTIES OF THE EMPLOYEE. SUPERVISORS ARE PERMITTED TO PARTICIPATE IN LABOR ORGANIZATIONS TO THE EXTENT AUTHORIZED IN SECTION 1709 OF THIS TITLE.

Comment: These amendments are intended to clearly authorize collective bargaining concerning compensation matters as an integral part of the labor-management relations program. *See* note 100 *supra*. The second amendment is designed to facilitate usage of a generic term throughout the title when referring to collective bargaining by the Mayor or the educational boards or the independent agencies. *See* note 97 *supra*. The final amendment clarifies the status of management officials and supervisors within labor organizations. All restrictions or provisions relating to supervisors are collected within the unit determination section for clarity. *See* note 84 *supra*.

(i) Section 1702 is amended as follows:

Sec. 1702. *Labor-Management Relations Program*

~~(a) The Public Employee Relations Board, (hereinafter in this title referred to as the "Board") shall issue rules and regulations establishing a labor management relations program to implement the policy set forth in this title.~~

~~(b) The labor management relations program shall include: (1) a sys-~~

~~tem for the orderly resolution of questions concerning the recognition of majority representatives of employees; (2) the resolution of unfair labor practice allegations; (3) the protection of employee rights as set forth in section 1706 of this title; (4) the right of employees to participate through their duly designated exclusive representative in collective bargaining concerning terms and conditions of employment as may be appropriate under this act and rules and regulations issued pursuant thereto; (5) the scope of bargaining; (6) the resolution of negotiation impasses concerning matters appropriate for collective bargaining; and (7) any other matters which affect employee-employer relations.~~

~~(e)~~(A) Impasse resolution machinery may include, but need not be limited to the following:

- (1) mediation;
- (2) fact-finding;
- (3) advisory arbitration;
- (4) request for injunction;
- (5) binding arbitration;
- (6) final best offer binding arbitration; and
- (7) final best offer binding arbitration item by item ~~on non-compensation matters.~~

~~(d)~~(B) If, after a reasonable period of negotiation concerning the terms and conditions of employment AND *MATTERS AFFECTING COMPENSATION* to be incorporated in a collective bargaining agreement, further negotiation appears to be unproductive to the Board, an impasse shall be deemed to have occurred. Where deemed appropriate, impasse resolution procedures may be conducted by the Board, its staff or third parties chosen either by the Board or by the mutual concurrence of the parties to the dispute. Impasse resolution machinery may be invoked by either party or on application of the Board. The choice of the form(s) of impasse resolution machinery to be utilized in a particular instance shall be the prerogative of the Board, after appropriate consultation with the interested parties. In considering the appropriate award for each impasse item to be resolved, any third party shall consider at least the following criteria:

* * * * *

Comment: These amendments are designed to eliminate the duplication between section 502 and this section. The limitation upon using final best item binding arbitration item-by-item will be available in matters affecting compensation as well. The general provisions concerning the bargaining process are expanded to include compensation bargaining. *See* notes 51, 53, 99, & 104 *supra*.

(j) Section 1703 is amended as follows:

* * * * *

(c) ~~The Board shall prescribe the rules and regulations needed to effect this section.~~ Any complaint of a violation of this section shall be filed with the Board.

Comment: This amendment is designed to eliminate needless duplication.

(k) Section 1704 is amended as follows:

Sec. 1704. *Unfair Labor Practices*

(a) ~~The District, MANAGEMENT,~~ agents and representatives are prohibited from:

* * * * *

Comment: This amendment is technical. Cf. Amendment § 2(i). See notes 96 & 117 *supra*.

(l) Section 1707 is amended as follows:

Sec. 1707. *Union Security: Dues Deduction*

Any labor organization which has been certified as the exclusive representative shall, upon request, have its dues and uniform assessments deducted and collected by the employer from the salaries of those employees who authorize the deduction of said dues. ~~Such authorization, costs and termination shall be proper subjects of collective bargaining. Service fees may be deducted from an employee's salary by the employer if such a provision is contained in the bargaining agreement.~~

SERVICE FEES MAY BE DEDUCTED BY THE EMPLOYER FROM AN EMPLOYEE'S SALARY WITHOUT AUTHORIZATION BY THE EMPLOYEE IF SUCH AUTHORITY IS CONTAINED WITHIN THE PROVISIONS OF A BARGAINING AGREEMENT.

Comment: This amendment is technical and restates the existing provisions of the Personnel Act. See note 112 *supra*.

(m) Section 1708 is amended as follows:

Sec. 1708. *Management Rights; Matters Subject to Collective Bargaining*

(a) ~~The respective personnel authorities (management)~~ **MANAGEMENT** shall retain the sole right, in accordance with applicable laws and rules and regulations: (1) to direct employees of the agencies; (2) to hire, promote, transfer, assign and retain employees in positions within the agency and to suspend, demote, discharge or take other disciplinary action against employees for cause; (3) to relieve employees of duties because of

lack of work or other legitimate reasons; (4) to maintain the efficiency of the District government operations entrusted to them; (5) to determine the mission of the agency, its budget, its organization, the number of employees and the number, types and grades of positions of employees assigned to an organizational unit, work project or tour of duty, and the technology of performing its work; or its internal security practices; and (6) to take whatever actions may be necessary to carry out the mission of the District government in emergency situations.

~~(b) All matters shall be deemed negotiable except those that are prescribed by this title. Negotiations concerning compensation are authorized to the extent provided in section 1716 of this title.~~

(b) MANAGEMENT SHALL ALSO RETAIN THE SOLE RIGHT, IN ACCORDANCE WITH THE PROVISIONS OF THIS ACT, TO (1) ISSUE RULES AND REGULATIONS AFFECTING THE IMPLEMENTATION OF THIS SECTION; (2) TO IMPLEMENT THE PROVISIONS OF SUBSECTION (E) OF SECTION 801, SUBSECTION (D) OF SECTION 801A, AND SECTION 909 OF THIS ACT; (3) TO ISSUE RULES AND REGULATIONS TO IMPLEMENT THE PROVISIONS OF SECTIONS 901, 903, 905, 907, AND 908 AND TITLE X OF THIS ACT; (4) TO DEVELOP CLASSIFICATION POLICIES IN ACCORDANCE WITH THE PRINCIPLES OF SECTIONS 1101 AND 1102 OF THIS ACT; (5) TO CARRY OUT THE PURPOSES OF SECTIONS 1103 THROUGH 1112 AND SECTION 1114 OF THIS ACT UNTIL SUCH TIME AS ANY OF THESE PROVISIONS ARE PRE-EMPTED BY COLLECTIVE BARGAINING AGREEMENTS CONCERNING MATTERS AFFECTING COMPENSATION; (6) TO CARRY OUT THE PROVISIONS OF SECTION 1202 OF THIS ACT; (7) TO DEVELOP EMPLOYEE DEVELOPMENT PROGRAMS FOR MANAGEMENT OFFICIALS; (8) TO REQUIRE THAT SANCTIONS AFFECTING EMPLOYEES FOR CAUSE BE LIMITED TO THE BASES PROVIDED IN SUBSECTION (D) OF SECTION 1601 OF THIS ACT; AND (9) TO REQUIRE THE MINIMUM EMPLOYEE PROCEDURAL PROTECTIONS AND RETENTION PREFERENCES IN A REDUCTION-IN-FORCE AS PROVIDED IN SECTION 2403 OF THIS ACT.

(C) ALL MATTERS AFFECTING COMPENSATION AND TERMS AND CONDITIONS OF EMPLOYMENT SHALL BE DEEMED NEGOTIABLE, EXCEPT TO THE EXTENT PROSCRIBED BY THIS TITLE.

Comment: This extensive amendment is not designed to change any policy decision of the Council, but rather is an attempt to place all rights and proscriptions upon the bargaining process within a single section of the Personnel Act. See note 103 *supra*.

(n) Section 1709 is amended as follows:

Sec. 1709. *Unit Determination*

(a) The determination of an appropriate unit will be made on a case to case basis and will be made on the basis of a properly supported request from a labor organization. No particular type of unit may be predetermined by management officials nor can there be any arbitrary limit upon the number of appropriate units within an agency. The essential ingredient in every unit is community of interest: PROVIDED, HOWEVER, that an appropriate unit must also be one that promotes effective labor relations and efficiency of agency operations AND *SERVES TO MINIMIZE THE NUMBER OF DISPARATE COMPENSATION SYSTEMS WITHIN THE DISTRICT GOVERNMENT*. A unit should include individuals who share certain interests such as skills, working conditions, common supervision, physical location, organization structure, distinctiveness of functions performed and the existence of integrated work processes. No unit shall be established solely on the basis of the extent to which employees in a proposed unit have organized, however, membership in a labor organization may be considered as one factor in evaluating the community of interest of employees in a proposed unit.

* * * * *

(c) *FOR THE PURPOSES OF SUBSECTION (B) OF THIS SECTION, A "SUPERVISOR" IS AN EMPLOYEE HAVING AUTHORITY, IN THE INTEREST OF AN AGENCY, TO HIRE, TRANSFER, SUSPEND, LAY OFF, RECALL, PROMOTE, DISCHARGE, ASSIGN, REWARD, OR DISCIPLINE OTHER EMPLOYEES, OR RESPONSIBILITY TO DIRECT THEM, OR TO EVALUATE THEIR PERFORMANCE, OR TO ADJUST THEIR GRIEVANCES, OR EFFECTIVELY TO RECOMMEND SUCH ACTION, IF IN CONNECTION WITH THE FOREGOING THE EXERCISE OF AUTHORITY IS NOT OF A MERELY ROUTINE OR CLERICAL NATURE, BUT REQUIRES THE USE OF INDEPENDENT JUDGMENT.*

(e)(d) Two (2) or more units for which the labor organization holds exclusive recognition within an agency may be consolidated into a single larger unit if the Board determines the larger unit to be appropriate. The Board shall certify the labor organization as the exclusive representative in the new unit when the unit is found appropriate.

Comment: These amendments reflect the overriding principle concerning the creation of bargaining units for compensation as a factor in initial determination of units. See note 99 *supra*. Second, the definition of supervisor generally used in labor relations—and used under the earlier BLR formulation—is readopted in this section where appropriate. See note 83 *supra*.

(o) Section 1710 is amended as follows:

* * * * *

(b)(3) THE BOARD MAY, ON ITS OWN INITIATIVE, ORDER A HEARING TO DETERMINE IF UNITS SHOULD BE CONSOLIDATED TO BETTER EFFECT THE OBJECTIVES OF SUBSECTION (A) OF SECTION 1709 OF THIS TITLE. SHOULD THE BOARD DETERMINE THAT A DIFFERENT UNIT SHOULD BE RECOGNIZED, THEN IT SHALL ORDER REPRESENTATION ELECTIONS AS PROVIDED IN THIS SECTION.

(c) Representation elections shall be conducted by an impartial body selected by the mutual agreement of the parties or, in the absence of a mutual agreement, AN IMPARTIAL BODY SELECTED by the Board. The entity conducting the election shall be subject to the provisions of this Act, those rules and regulations as may be issued by the Board, or any election agreement as may be reached which is not inconsistent with this title.

* * * * *

Comment: The first amendment authorizes the PERB to *sua sponte* consolidate units to effect better the objectives of the Act. The second amendment is of a technical nature. *See* notes 89-90 *supra*.

(p) Section 1711 is amended as follows:

Sec. 1711. *Rights Accompanying Exclusive Recognition*

(a) The labor organization which has been certified to be the exclusive representative of all employees in the unit shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to membership in the labor organization: PROVIDED, HOWEVER, that the employee pays dues or service fees in an amount equal to the dues of the employees' organizations. ~~Agency shop and other labor organization security provisions should be an appropriate issue for collective bargaining.~~

* * * * *

Comment: This is a technical conforming amendment.

(q) Section 1713 is amended as follows:

(b) The Board may request the Superior Court of the District of Columbia to enforce any order issued pursuant to this title, including those for appropriate temporary relief or restraining orders. No defense or objection to an order of the Board shall be considered by the court, unless such defense or objection was first urged before the Board. ~~The findings of the Board with respect to questions of fact shall be conclusive if supported~~

~~by substantial evidence on the record considered as a whole. THE FINDINGS OF THE BOARD, WITH RESPECT TO QUESTIONS OF FACT IF SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD CONSIDERED AS A WHOLE, AND WITH RESPECT TO QUESTIONS OF LAW IF NOT CLEARLY ERRONEOUS, SHALL BE CONCLUSIVE. The Court may grant such temporary relief or restraining order as it deems just and proper and enter a decree enforcing, modifying and enforcing, as so modified, or setting aside, in whole or in part, the order of the Board.~~

* * * * *

Comment: This amendment is designed to clarify and make consistent the standard of judicial review of orders of the PERB. See note 63 *supra*.

(r) Section 1715 is amended as follows:

Sec. 1715. *Collective Bargaining Agreements*

~~(a) An agreement with a labor organization is subject to the approval of the Mayor or his or her designee, or in the case of employees of the District of Columbia Board of Education or the Board of Trustees of the University of the District of Columbia by the respective Boards. THE MAYOR SHALL NEGOTIATE WITH A LABOR ORGANIZATION GRANTED EXCLUSIVE RECOGNITION UNDER THIS ACT: PROVIDED, HOWEVER, THAT THE DISTRICT OF COLUMBIA BOARD OF EDUCATION AND THE BOARD OF TRUSTEES OF THE UNIVERSITY OF THE DISTRICT OF COLUMBIA SHALL NEGOTIATE WITH THEIR RESPECTIVE EDUCATIONAL EMPLOYEES. OTHER AGENCIES HAVING INDEPENDENT PERSONNEL AUTHORITY SHALL COOPERATE AND CONSULT WITH THE MAYOR DURING NEGOTIATIONS WITH LABOR ORGANIZATIONS GRANTED EXCLUSIVE RECOGNITION WITH EMPLOYEES OF SUCH INDEPENDENT PERSONNEL AUTHORITIES. SPECIFIC PROVISIONS CONCERNING TERMS AND CONDITIONS OF EMPLOYMENT, WHEN NOT INCONSISTENT WITH OVERALL CITY POLICY OBJECTIVES OF THE MAYOR IN NEGOTIATING TERMS AND CONDITIONS OF EMPLOYMENT AND MATTERS AFFECTING COMPENSATION, MAY BE INCLUDED WITHIN A BARGAINING AGREEMENT AT THE REQUEST OF AN INDEPENDENT PERSONNEL AUTHORITY FOR ITS EMPLOYEES.~~ An agreement shall be approved within forty-five (45) days from the date of its execution by the parties, if it conforms to applicable law. If disapproved because certain provisions are asserted to be contrary to law, the agreement shall either be returned to the parties for renegotiation of the offensive provisions or such provisions shall be deleted from the agreement. An agreement which has not been approved or disapproved within the prescribed period of forty-five (45) days shall go into effect on the forty-sixth day and shall be binding on the parties.

~~(b) The Mayor and each appropriate personnel authority shall submit the collective bargaining agreement to the Council for its information.~~

(b) MANAGEMENT SHALL SUBMIT EACH COLLECTIVE BARGAINING AGREEMENT TO THE COUNCIL WITHIN FIVE (5) DAYS OF ITS EXECUTION BY THE PARTIES. IN THE CASE OF A COLLECTIVE BARGAINING AGREEMENT HAVING A FINANCIAL IMPACT BEYOND THAT AUTHORIZED BY LAW, THE COUNCIL MAY DISAPPROVE SUCH AGREEMENT IN ITS ENTIRETY WITHIN THIRTY (30) DAYS OF ITS RECEIPT FROM MANAGEMENT BY A VOTE OF TWO-THIRDS (2/3) OF ITS MEMBERS PRESENT AND VOTING.

Comment: These amendments clarify the bargaining posture for Executive agencies and independent personnel authorities, so that the bulk of the bargaining (with the exception of educational boards' employees) will be undertaken by the Mayor. *See* notes 98-99, 137 & 142 *supra*.

(s) Section 1716 is amended as follows:

Sec. 1716. *Collective Bargaining Concerning Compensation*

(a) The Board shall provide for collective bargaining concerning compensation under the procedures of and on the dates provided in section 1111 of this Act. The Mayor, *FOR FIRE FIGHTERS, POLICE OFFICERS, AND OTHER OCCUPATIONAL GROUPS*, the District of Columbia Board of Education for its educational employees and the Board of Trustees of the University of the District of Columbia for its educational employees shall negotiate ~~agreements regarding non-compensation issues at the same time as compensation issues.~~ *SINGLE AGREEMENTS CONCERNING TERMS AND CONDITIONS OF EMPLOYMENT AND MATTERS AFFECTING COMPENSATION.*

~~(b) The provisions of this section shall become effective on January 1, 1980, and shall apply to all employees, including employees described in section 204 of this act, of a particular occupational group who are represented by a labor organization which has been granted exclusive recognition under this act by the Board. The determination of an appropriate unit for the purpose of negotiations concerning compensation shall not require a request from a labor organization. In determining appropriate bargaining units for negotiations concerning compensation, the Board shall authorize broad units of occupational groups so as to minimize the number of different pay systems or schemes. The Board may authorize bargaining by multiple employer or employee groups as may be appropriate.~~

THE BOARD MAY CERTIFY, ON ITS OWN INITIATIVE AS APPROPRIATE ADDITIONAL UNITS OR GROUPS OF UNITS TO BARGAIN MATTERS AFFECTING COMPENSATION, BROAD OCCUPATIONAL GROUPS WHICH HAVE A COMMUNITY OF IN-

TEREST AND WHICH SHALL SERVE TO MINIMIZE THE NUMBER OF DISPARATE COMPENSATION SYSTEMS. The Board may authorize bargaining by multiple employer or employee groups as may be appropriate.

(C) NO RIGHTS AND BENEFITS GUARANTEED BY TITLES XXI, XXII, AND XXVI OF THIS ACT MAY BE ADJUSTED IN ANY MANNER, WITHOUT THE CONCURRENCE OF TWO-THIRDS (2/3) OF THE MEMBERS OF THE COUNCIL VOTING AND PRESENT BY ACT. NO ACT AUTHORIZED BY THIS SUBSECTION MAY BE ENACTED UNTIL AFTER JANUARY 1, 1982.

(D) ON AND AFTER JANUARY 1, 1981, NO UNIT SHALL BE CERTIFIED BY THE BOARD UNLESS THE UNIT, OR APPROPRIATE GROUP OF UNITS AS SHOWN IN THE PETITION FOR CERTIFICATION, MEETS THE CRITERIA FOR BARGAINING UNITS AFFECTING COMPENSATION AS PROVIDED IN THIS TITLE. ALL BARGAINING AGREEMENTS SHALL BE FOR A MINIMUM PERIOD OF TWO (2) YEARS.

(E) THE PROVISIONS OF SUBSECTION (H) OF SECTION 404 OF THIS ACT SHALL NOT BECOME EFFECTIVE UNTIL JANUARY 1, 1981.

Comment: These amendments clarify provisions of the Act relating to collective bargaining concerning compensation. *See* notes 99 & 144-46 *supra*.

(t) Section 2004 is amended as follows:

Sec. 2004. *Authority*

The Mayor shall issue rules and regulations consistent with this title and such laws of the federal government and the District of Columbia as they may from time to time be amended for the establishment, operation and administration of the District government's occupational safety and health management program. ~~Programs and procedures developed under the authority of this title are appropriate matters for collective bargaining with labor organizations.~~

* * * * *

(u) Section 2401 is amended as follows:

Sec. 2401. *Policy*

The Mayor and the District of Columbia Board of Education shall issue rules and regulations establishing a procedure for the orderly termination of employees, taking full account of non-discrimination provisions and appointments' objectives of this Act. Each agency shall be considered a competitive area for reduction-in-force purposes. Lesser or broader

competitive areas within an agency are prohibited. ~~When as a result of a reorganization order a function is transferred from one District agency to another District agency, the procedures for transferring the employees identified with the continuing function shall be negotiated with the recognized labor organization.~~

(v) Section 2402 is amended as follows:

* * * * *

~~(d) Policies and procedures developed under the authority of this title are appropriate matters for collective bargaining with labor organizations: PROVIDED, HOWEVER, that no such bargaining agreement may provide benefits or procedures of less employee protection than those contained in this title.~~

(w) Section 3208 is amended as follows:

* * * * *

AND (C) THE PROVISIONS OF TITLE XVII AFFECTING THE LABOR-MANAGEMENT RELATIONS PROGRAM WILL GOVERN CONFLICTING INTERPRETATIONS.

Comment: This amendment creates an additional rule of statutory construction in accord with the amendments made in this Act.

Sec. 3. All amendments effected by this Act shall become effective on the date that this act becomes law as provided in section 5, except that the amendments effected by section 2(s) of this Act to section 1715(b) of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 and section 2(t) of this Act adding subsections (c) and (d) to section 1716 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 shall become effective on January 1, 1981.

Sec. 4. On January 1, 1981, the provisions of section 1113 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 are repealed.

Comment: See note 137 supra.

Sec. 5. This Act shall become law as provided for acts of the Council of the District of Columbia in section 602(c) of the District of Columbia Self-Government and Governmental Reorganization Act.