

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



DAN FRIEDMAN
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 19, 2010

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401

Re: *Senate Bill 1000 and House Bill 1294*

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 1000 and House Bill 1294, "State Employee and Retiree Health and Welfare Benefits Program – Baltimore Metropolitan Council – Eligibility." We write to bring to your attention an inadvertent drafting error that raises some doubt as to the ability of the Baltimore Metropolitan Council ("BMC") to participate as a satellite organization in the State Employee and Retiree Health and Welfare Benefits Program (the "State Program") for most of its current employees.¹ Notwithstanding the apparent drafting error, it is our view that the bills may be interpreted so as avoid that unintended and unpalatable outcome.

Effective July 1, 1992 the Baltimore Regional Council of Governments ("BRGoG"), an agency of the State, was abolished and the BMC was established in its place. Many of the former BRCoG employees became employees of BMC. Chapter 201, Laws of Maryland 1992. The BMC is not a unit of State government. Economic Development Article, §13-302(b). Under current law, however, the BMC participates in the State Program as a "satellite organization" pursuant to State Personnel and Pensions Article ("SPP"), §2-503(d)(1)(i). This provision limits the enrollment and coverage to active employees of certain satellite organizations, but does not authorize coverage for satellite organization retirees. Section 2-503(d)(1)(i) does not list the satellite organizations to which it applies, but provides that a general category of satellite organizations, those participating as of January 1, 1993, are eligible to participate in the

¹ According to the Department of Budget and Management, the BMC has approximately 27 current employees actively enrolled in health coverage.

State Program. Without such specific statutory authorization, participation in the State Program is limited to State employees and State retirees.

Senate Bill 1000 and House Bill 1294 seek to provide retiree health coverage for BMC employees and retirees who were employed by the BRCoG on June 30, 1992, by adding the BMC to SPP §2-511, which currently authorizes active employee and retiree coverage for two specific satellite organizations.² Although the bills do not seek to amend SPP § 2-503(d)(1)(i), the plain language of Senate Bill 1000 and House Bill 1294 appears to create the unintended consequence of repealing the ability of the BMC to participate as a satellite organization in the State Program for its active employees who were not employed by the Baltimore Regional Council of Governments on June 30, 1992.

To provide retiree participation to only the small group of current BMC employees that had been State employees with BRCoG, the drafter attached limiting language in subsection (a) of SPP §2-511, providing that BMC participation as a whole is limited to only that subset of employees.³ It is a rule of statutory construction that a specific statutory provision will control over a more general one on the same topic when there is a potential conflict between the two. Under that rule of construction the plain language of SPP §2-511, as amended by these bills, would control all BMC participation in the State Program. *See Md.-Nat'l Capital Park and Planning Com'n v. Anderson*, 395 Md. 172, 194-95, 909 A.2d 694, 707 (2006)("[i]t is a well-settled rule of statutory interpretation that 'when two statutes, one general and one specific, are found to conflict, the specific statute will be regarded as an exception to the general statute'"). Read literally, the plain language of House Bill 1294 and Senate Bill 1000 would restrict State Program participation to only BMC employees "who were employees of the Baltimore Regional Council of Governments on June 30, 1992."

² Those organizations are the Maryland Environmental Service and the Northeast Maryland Waste Disposal Authority.

³ Under SPP § 31-104 participation in the State Retirement and Pension Systems is limited to only the subset of BMC employees who were employees of BRCoG on June 30, 1992. Thus, if the bills had simply added BMC to SPP § 2-511(a) without the limiting language ("who were employees of the Baltimore Regional Council of Governments on June 30, 1992"), only that subset of current BMC employees (i.e., those employed on June 30, 1992) would be eligible for State Program coverage as retirees under §2-511(c) as amended by the bills. Because interpreting statutory language as mere surplusage is disfavored, *Rose v. Fox Pool Corp.*, 335 Md. 351, 359 (1994), in the absence of evident legislative intent it may have been argued that the limiting language specifically adding BMC to subsection (a) was a conscious effort to divest current employees of their access to health insurance benefits rather than a mere drafting error.

However, nothing in the testimony, the House and Senate committee Floor Reports, or the fiscal analyses for either bill suggests that the General Assembly intended to eliminate the access to State Program health coverage currently provided for all BMC employees. One would expect at least some mention in the legislative history had such a dramatic revocation of health benefits for 21 employees been contemplated. Nor does there appear to have been a strong State fiscal motivation for the elimination of such benefits because, as the Department of Legislative Services' Fiscal Note explains, BMC – not the State – is responsible for the costs of employee and retiree participation in the State Program. Rather, the testimony of sponsor Senator James N. Robey indicates a desire to maintain the *status quo* while providing authority for a specific set of employees to gain access to retiree health benefits in the State Program. *See also* Letter of Budget and Taxation Committee Chairman Ulysses Currie to Finance Committee Chairman Thomas M. Middleton, April 7, 2010 (“It is our understanding that BMC is already a participating satellite organization, and that the bill is essentially codifying existing practices.”).

The Court of Appeals has held that where a literal construction of statutory language would require a result inconsistent with legislative intent, “the plain meaning rule is not rigid.” *Kaczorowski v. City of Baltimore*, 309 Md. 505, 513 (1987). The *Kaczorowski* Court expressly supported the rule of statutory construction that declines to “permit a patent drafting error to frustrate [the legislative] goal. . . .” 309 Md. at 520.⁴ Here it appears that the technical drafting error was merely an effort to limit *retiree* health benefits to six BMC employees who were employed by the Baltimore Regional Council of Governments on June 30, 1992, not part of an unstated attempt to deny access to *employee* health benefits for 21 other BMC employees.

Further, it is unlikely that the General Assembly implicitly intended to repeal the statutory authority grandfathering BMC’s status as a satellite organization with access to health benefits for all its employees. Indeed, it is a rule of statutory construction that, whenever possible, legislative enactments should be interpreted to avoid repeals by implication. *Farmers & Merchants Nat’l Bank v. Schlossberg*, 306 Md. 48, 56 (1986). Because there is no irreconcilable conflict between SPP § 2-503 and § 2-511 as amended by the bills, and it is possible to construe those sections in harmony, it is possible to give effect to both.

⁴ In *Kaczorowski*, the Court refused to allow a drafting mistake to unintentionally repeal a bond issuing authority.

The Honorable Martin O'Malley
May 19, 2010
Page 4

As a result, we believe that Senate Bill 1000 and House Bill 1294 may be interpreted in a manner that would not act to eliminate State Program health benefits coverage of the active employees of the BMC who were not employees of the Baltimore Regional Council of Governments in 1992. We nevertheless urge that technical legislation be introduced in the next Session to correct the drafting error so that the language of SPP § 2-511 may be made consistent with the evident intent of the General Assembly and all doubt on this matter be eliminated.⁵

Very truly yours



Douglas F. Gansler
Attorney General

DFG/DF/BAK/kk

cc: The Honorable James N. Robey
The Honorable Carolyn J. Krysiak
The Honorable Adrienne A. Jones
The Honorable John P. McDonough
Joseph Bryce
Karl Aro

⁵ Such a correction would require only the removal of the words "who were employees of the Baltimore Regional Council of Governments on June 30, 1992" from § 2-511(a)(3).