PLM I

DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

10,882

FILE: B-195418 **DATE:** July 30, 1979

MATTER OF: Federal Reserve Board - Applicability of Senior Executive Service to

DIGEST: Federal Reserve Act, as amended, expressly excepts the appointment and compensation of all employees of the Board of Governors, Federal Reserve System, from the provisions of the civil service laws and regulations. The Act must be given priority over a subsequently enacted statute applicable to Federal agencies generally, absent a clear indication that the Congress intended otherwise. Hence, the provisions of Civil Service Reform Act of 1978 establishing a Senior Executive Service do not apply to the employees of the Board.

DLG00925

By letter dated July 10, 1979, the General Counsel of the Office of Personnel Management (OPM) has requested our opinion whether the employees of the Board of Governors of the Federal Reserve System are subject to the provisions of ~~Title IV~~ of the Civil Service Reform Act of 1978, which Public Law No. 95-454, October 13, 1978, 92 Stat. 1111, 5 U.S.C. § 3131 et seq., establishing a Government-wide Senior Executive Service (SES), designed to insure the high quality of Government executives.

It is the position of OPM that the employees of the Board of Governors of the Federal Reserve System ("Federal Reserve Board") are subject to the provisions of Title IV of the Civil Service Reform Act governing the Senior Executive Service. OPM has found that the Board falls under the SES criteria contained in 5 U.S.C. § 3132(a), and thus is included under SES, unless excluded by the President pursuant to 5 U.S.C. § 3132(c). OPM points to Executive Order No. 9004, dated December 30, 1941, which placed all positions under the Board of Governors in Schedule A, Positions Excepted From Examination, which thereby ~~excluded~~ all Board employees from the competitive service. OPM argues that but for ~~this~~ Executive order, the Board's employees would have been swept into the competitive service by Executive Order No. 8743, dated April 23, 1941. Executive Order No. 8743 provided that all offices and positions in the executive civil service are covered into the classified civil service, unless excepted under Schedule A of the Civil Service Rules (and other exceptions not applicable).

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OPM believes that the provisions in section 11(l) of the Federal Reserve Act of 1913, which states that "nothing herein shall prevent the President from placing said employees in the classified service," made the Board's independent status conditional and provided the statutory authority for a subsequent change in that status. As stated in a letter of June 15, 1979, to the Board, OPM's position is as follows:

> "Under the condition, the Board positions could have been brought into the competitive service well before the reach of the Ramspeck Act [54 Stat. 1211, November 26, 1940] and Executive Order No. 8743, had the President elected to do so. The terms of the Executive Order No. 8743 superseding the Board's independent authority to place Board employees in the competitive service left the President no choice but the need to exercise his Presidential authority under the Federal Reserve Act's conditional provision if he wanted to avoid the competitive service reach of Executive Order No. 8743."

OPM concludes that the placement of the Board employees in Schedule A unequivocally placed them in the civil service, and "owing to the excepted service Schedule A status of the Board's employees, their positions would qualify as SES positions under the definition in 5 U.S.C. § 3132(a)."

The Board of Governors disagrees with ~~the conclusions reached by~~ OPM.) In concluding that its employees are not subject to the Senior Executive Services, the Board relies on section 11(l) of the Federal Reserve Act of 1913, and section 6(b) of the Banking Act of 1933, both of which are set out below.

Section 11(l) of the Federal Reserve Act of 1913, 38 Stat. 251, 262, as enacted authorized the Board:

> "(l) To employ such attorneys, experts, assistants, clerks, or other employees as may be deemed necessary to conduct the business of the board. All salaries and fees shall be fixed in advance by said board and shall be paid in the same manner as the

> salaries of the members of said board. All such attorneys, experts, assistants, clerks, and other employees shall be appointed without regard to the provisions of the Act of January sixteenth, eighteen hundred and eighty-three (volume twenty-two, United States Statutes at Large, page four hundred and three), and amendments thereto, or any rule or regulation made in pursuance thereof: Provided, That nothing herein shall prevent the President from placing said employees in the classified service." (Emphasis added.)

In 1933, Congress moved to strengthen the independence of the Federal Reserve Board. Section 6(b) of the Banking Act of 1933, 48 Stat. 162, 167, amended section 10 of the Federal Reserve Act, 12 U.S.C. § 244 to read, in pertinent part, as follows:

> "* * * The Board shall determine and prescribe the manner in which its obligations shall be incurred and its disbursements and expenses allowed and paid, and may leave on deposit in the Federal Reserve banks the proceeds of assessments levied upon them to defray its estimated expenses and the salaries of its members and employees, whose employment, compensation, leave, and expenses shall be governed solely by the provisions of this Act, specific amendments thereof, and rules and regulations of the Board not inconsistent therewith; and funds derived from such assessments shall not be construed to be Government funds or appropriated moneys * * *"

The Board points out that these provisions expressly empowered the Board to appoint employees without regard to the provisions of the Civil Service Act of 1883 "and amendments thereto or any rule or regulation made pursuant thereof." Further, section 6(b) states that the "employment, compensation, leave, and other expenses" of employees of the Board "shall be governed solely by the provisions" of the Federal Reserve Act, or "specific amendments thereof, and rules and regulations of the Board not inconsistent therewith." The Board's letter of March 12, 1979, to OPM states:

> "the purpose of this amendment to the Act was to reinforce the importance of the Board's independence within the government and in particular to insure that the Board is able to exercise control over its own internal management policies. H. Rep. No. 150, 73d Cong., 1st Sess. [2] (1933) * * *. Furthermore, it is the Board's view that, under generally accepted rules of statutory construction, civil service legislation enacted after the Federal Reserve Act and applying to all federal employees in general does not repeal by implication the express language of that Act, which confers on the Board the sole authority to manage its own employees * * *. It should be noted that Congress has never acted to revoke those provisions of the Federal Reserve Act that established the Board's independent status, nor has any such revocation been contained in any legislation dealing with the federal civil service in general."

We are of the opinion that the Board of Governors of the Federal Reserve System is not subject to Title IV, Senior Executive Service, of the Civil Service Reform Act for the following reasons.

The provisions of the Federal Reserve Act of 1913, as amended by the Banking Act of 1933, show a clear intent to give the Board independence in regard to its own personnel system. This intent is also reflected in the events that occurred in 1940 and 1941 following the passage of the Ramspeck Act of November 26, 1940. The understandings between the President, the Federal Reserve Board, and the Civil Service Commission during the period in which the executive orders relied upon by OPM were issued do not support the interpretation that OPM has placed on the executive orders.

Specifically, our Office was furnished three documents which support a different interpretation of the President's actions. These documents consist of a draft letter prepared by the Board for signature by the President which was forwarded to the President on December 27, 1940, by the chairman of the Board.

The draft letter prepared for the President and addressed to the President of the Civil Service Commission reads as follows:

> "The Chairman of the Board of Governors of the Federal Reserve System has conferred with me regarding the possibility of action under the Ramspeck Civil Service Act of November 26, 1940, to place the employees of his Board under the classified civil service and the Classification Act of 1923, as amended.
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> "I have advised him that it is not my intention to place the employees of the Board of Governors of the Federal Reserve System under the classified civil service or the Classification Act, as amended, in view of the desirability of avoiding a condition under which the employees of the Board of Governors would be placed in a different status in this regard from those of the Federal Reserve Banks and their branches, and in view also of the fact that the salaries of the Board's employees are paid from funds derived from assessments on the Federal Reserve Banks and not from appropriations by Congress."

According to a memorandum of December 30, 1940, in the Board's files the draft letter was retyped on White House stationery and signed by the President. The Commissioners replied to the President by letter dated January 3, 1941, which reads as follows:

> "The Commission has received your letter of December 27, 1940, to the effect that it is not your intention to place the employees of the Board of Governors of the Federal Reserve System under the classified Civil Service Act or the Classification Act, as amended. The Commission, of course, will be guided accordingly."

Finally, a Board of Governors' memorandum, written for the files of the Board of Governors and dated March 10, 1941, summarized a conversation concluded that day between the Chairman of the Board of Governors, Mr. Eccles, and the Administrative

Assistant to the President, Mr. McReynolds, with regard to the status of the Board under the Ramspeck Act and the proposed Executive Order [8743] of the President. Chairman Eccles is reported to have related the substance of what Mr. McReynolds said in pertinent part as follows:

> "He said that he was perfectly sure that we were not included. He said that there was nothing further for us to do, nothing whatever; just to forget it."

The memorandum concluded as follows:

> "Chairman Eccles said that Mr. McReynolds said that he considered that we were not under the law because we are an independent agency reporting directly to Congress and that we do not get any appropriations from Congress. Mr. McReynolds went on to say that as far as he was concerned, it would be a big mistake to put us under because we have a special status in relation to Congress and that he thought that until the whole System is changed there would be no point in putting us under. He emphasized the fact that that was his view; that it was also the view of the Commission, and that the Attorney General's office agreed."

We find the exchange of letters between the President and the Civil Service Commission, along with the contemporaneous memorandum reporting the position of the White House, to be persuasive in showing a clear intent to keep the Board entirely independent of the civil service system. We believe that these documents contradict the interpretation placed by OPM on the intent of Executive Orders 8743 and 9004. Further, we find nothing inherent in either of these Executive Orders which is inconsistent with the independence given the Board in hiring its employees and fixing their compensation under section 11(1) of the Federal Reserve Act of 1913 and by section 6(b) of the Banking Act of 1933. Further, in view of the history of these Executive Orders we can not envision the President intending that either of these Executive Orders would provide the means by which future legislation, such as that creating the SES, would result in the Board losing its independence with respect to its employees.

(There is nothing in the legislative history of the Civil Service Reform Act of 1978 indicating any intent to alter the Board's independent status in the Government or to eliminate the Board's autonomy in matters of personnel management.) In enacting the Federal Reserve Act and in amending section 10 of the Act in 1933, Congress dealt specifically with the precise issue of the Board's relationship to the Federal civil service system. On the basis of an explicit finding that the Board's insulation from external influences was essential to the performance of its mandated functions, Congress provided that the Board's personnel policies and actions are to be governed solely by the provisions of the Federal Reserve Act. On the other hand, Title IV of the Civil Service Reform Act deals generally with senior management practices in the civil service at large and, consequently, Title IV cannot reasonably be viewed as repealing by implication the earlier congressional determination giving the Board exclusive authority over its own employees.

It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." Morton v. Mancari, 417 U.S. 535, 550-551. The principle has also been stated as follows:

> "The enactment of a general law broad enough in its scope and application to cover the field of operation of a special or local statute will generally not repeal a statute which limits its operation to a particular phase of the subject covered by the general law * * * An implied repeal of prior statutes will be restricted to statutes of the same general nature, since the legislature is presumed to have known of the existence of prior special or particular legislation, and to have contemplated only a general enactment. Therefore, where the later general statute does not present an irreconcilable conflict the prior special statute will be construed as remaining in effect as a qualification of or exception to the general law." 1A J. Sutherland, Statutes and Statutory Construction § 23.15 (4th

ed. C. Sands 1972). See United States v. United Continental Tuna Corp., 425 U.S. 164, 168; Pasadas v. National City Bank, 296 U.S. 497, 503.

When Congress enacted the employee provisions of the Federal Reserve Act, it was focusing on the independence of the Board of Governors, specifically with regard to the hiring and compensating of its own employees. When Congress enacted the Civil Service Reform Act of 1978, its focus was on the objective of improving the quality of public service, and it enacted a general provision, creating the Senior Executive Service applicable to the broad universe of civil service employees not otherwise exempt. Thus, unless a "clear intention otherwise" can be discerned, the principle of statutory construction discussed above counsels that the specific provisions of the Federal Reserve Act are to be given effect.

We do not believe that the present situation falls into any of the categories of repeals by implication. The statutory provisions at issue here cannot be said to be in "irreconcilable conflict" in the sense that there is a positive repugnacy between them or that they cannot mutually coexist. "When two statutes are capable of co-existence, it is the duty of the courts * * * to regard each as effective." Morton v. Mancuri, supra., 417 U.S. at 551.

Here, the basic purposes of the Civil Service Reform Act can be fairly served by giving full effect to the provisions of the Federal Reserve Act. The primary purpose of the Civil Service Reform Act provisions establishing the SES "was to establish a Senior Executive Service to ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and otherwise of the highest quality. "5 U.S.C. § 3131. The purpose of the Banking Act of 1933 in amending the Federal Reserve Act was to leave "to the Board the determination of its own internal management policies." S. Rep. No. 77, 73d Cong., 1st Sess. 14 (1933).

By allowing the Board to continue to hire and compensate its employees outside of the civil service system, the purposes of the Federal Reserve Act will obviously be served. Yet continued application of

12 U.S.C. 244 and 248(l) will not unduly interfere with the operation of the Civil Service Reform Act and specifically the SES. Since it is possible for the statutes to coexist in this manner, they are not so repugnant to each other as to justify a finding of an implied repeal. Further, there is nothing in the legislative history of the Civil Service Reform Act to suggest that Congress gave any consideration to a repeal of these provisions of the Federal Reserve Act. We conclude, therefore, that the specific provisions of the Federal Reserve Act must prevail over the broader, more generally applicable SES provisions of the Civil Service Reform Act.

Accordingly, although we recognize that the scope of the Senior Executive Service was intended to be very broad, we believe, in the absence of contrary legislative history, that the statutory independence of the Federal Reserve System mandates the conclusion that the employees of the Board of Governors are not covered by the Senior Executive Service.

Comptroller General
of the United States