

CASE NO. 23-CV-185  
(2022 CA 02435 P(MPA))



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**DISTRICT OF COLUMBIA  
COURT OF APPEALS**

**AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, AFL-CIO, LOCAL 872  
APPELLANT**

**V.**

**D.C. PUBLIC EMPLOYEE RELATIONS BOARD  
APPELLEE**

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**APPEAL FROM THE FEBRUARY 14, 2023 FINAL ORDER  
OF  
JUDGE SHANA FROST MANTINI  
OF THE SUPERIOR COURT OF THE DISTRICT OF  
COLUMBIA**

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**REPLY BRIEF OF APPELLANT**

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**TABLE OF CASES, STATUTES AND AUTHORITIES**

*Dingwall v. D.C. Water and Sewer Authority*, 766 A.2d. 974 (D.C. 2001). . . . .1

\* *D.C. Office of Labor Relations and Collective Bargaining v. Public Employee Relations Board*, Case No. 0030867 P(MPA) (D.C. Super Ct, September 29, 2021). . . . . 2

\* *D.C. Waters and Sewer Authority v. Delon Hampton & Assoc.*, 851 A 2d. 411 (D.C. 2004). . . . . 1

\* *Fraternal Order of Police Metropolitan Labor Commt. v. District Of Columbia*, 82 A.3d. 803 (D.C. 2014). . . . . 3

\* *Thorn v. Walker*, 912 A.2d. 1192 (D.C. 2006). . . . .3

**STATUTES**

D.C. Code § 1-617.08(a). . . . . 2, 4

D.C. Code § 7-2304(b)(16). . . . .1

D.C. Code §§ 34-2202.02(a), 34-2205.15(a). . . . . 2

**AUTHORITIES**

\* *American Federation of Government Employees, AFL-CIO Local 631 v. Office of Labor Relations and Collective Bargaining*, Slip Opinion 1726 (Sept. 12, 2019). . . . .2

\* *American Federation of Government Employees, AFL-CIO Local 631 v. D.C. Water and Sewer Authority*, Slip Opinion 1837 (Apr. 27, 2023). . . . .5

\* Case principally relied upon are marked with an asterisk.

**GLOSSARY**

Authority. . . . .	D.C. Water and Sewer Authority
CMPA. . . . .	Comprehensive Merit Personnel Act
COVID Emergency Response Act. . . .	COVID-19 Emergency Response Amendment Act of 2020
Local 872 . . . . .	American Federation of Government Employees, AFL-CIO, Local 872
PERB. . . . .	Public Employee Relations Board

## **I. The District Has No Personnel Authority Over The Water And Sewer Authority**

The Public Employee Relations Board (PERB), *Appellee Brf* at 19-22, asserts the D.C. Water and Sewer Authority (Authority) was subordinate to the District for purposes of the personnel actions listed in the COVID-19 Response Emergency Amendment Act of 2020 ( COVID Emergency Response Act), D.C. Code § 7-2304(b)(16). The COVID Emergency Response Act, specifically, states the personnel actions, exempted from coverage of the Comprehensive Merit Personnel Act (CMPA), applied to agencies, subordinate to the Mayor. The D.C. Water and Sewer Authority is an independent agency, distinct from the District and is not subordinate to the Mayor, for any purposes, *D.C. Water and Sewer Authority v. Delon Hampton & Assoc.* 851 A.2d. 411, 416 (D.C. 2004) following *Dingwall v. D.C. Water and Sewer Authority*, 766 A.2d. 974, 977-8 (D.C. 2001). PERB attempts to create a fiction by comparing the proposals in the American Federation of Government Employees, AFL-CIO Local 872's negotiability appeal and asserting, without any factual support, the proposals are covered by the COVID Emergency Response Act, because the Authority is subject to the Mayor for purposes of the pandemic response. The enabling legislation of the Authority does not support such an interpretation and the specific language of the COVID Emergency Response Act does not support such an interpretation,

D.C. Code §§ 34-2202.02(a) and 34-2205.15 (a)(1) . The COVID Emergency Response Act did not authorize the Authority to take any unilateral actions, during the pandemic emergency. PERB's Opinion, J.A. 17, n. 17, states D.C. Code § 1-617.08(a)(6) granted the Authority the right to take action, in an emergency, without bargaining with the Union. PERB's ruling is an error of law and misstates the ruling in *D.C. Office of Labor Relations and Collective Bargaining v. D.C. Public Employee Relations Board*, No. 003086 P(MPA) ( D.C. Super. Ct. September 29, 2021).

## **II. A Negotiability Issue Must Be Raised Prior To Impasse Intervention By The Board**

PERB asserts Local 872 was required to file a negotiability appeal, because a negotiability issue may be raised at anytime, *Appellee Brf.* at 23-5. PERB's argument is contrary to the Board's precedent. In *American Federation of Government Employees Local 631 v. Office of Labor Relations and Collective Bargaining*, PERB Case No. 19-N-01, Slip Opinion 1726, p. 4 (September 12, 2019), PERB ruled a declaration of nonnegotiability must be made while the potential exists for meaningful give and take bargaining. Local 872 raised this issue in the motion to reconsider the Executive Director's Administrative Dismissal, J.A. 80. The attempt to assert Local 872 was required to file a negotiability appeal is not supported by PERB Rule 532 and not supported by the facts in this case. At no time, during negotiations or during the mediation, did the

Authority assert any management rights. The Authority's assertion of a negotiability issue was raised more than two weeks, after the Union filed a request for expedited arbitration, J.A. 72. PERB's dismissal of the Union's petition was an error of law.

### **III. A Claim Is Moot When The Behavior Cannot Be Repeated**

PERB asserts the issues in this matter are moot, because the COVID Emergency Response Act has expired, *Appellee Brf at 29-32. Thorn v. Walker*, 912 A. 2d. 1192, 1195 (D.C. 2006), held a case is moot when the parties "lack a legally cognizable interest in the outcome" [citations omitted]. To find a claim moot, a court must decide the behavior complained of, cannot reasonably be expected to recur, *Fraternal Order of Police Metropolitan Labor Committee v. District of Columbia*, 82 A.3d. 803, 813-14 (D.C. 2014).

The issue raised in this appeal and raised in Superior Court is whether PERB can apply the CMPA to permit management rights to be unilaterally implemented, without bargaining with a union. PERB's decision in this case states the Authority is subordinate to the District for purposes of management rights under D.C. Code 1-617.08(a) and states in an emergency, the Authority can take unilateral actions, without negotiating with the union. PERB's assertion the matters are moot is incorrect. The PERB decision changed the long standing PERB precedent,

applying the CMPA to require bargaining with a union, prior to implementing a management right. Without a correction of this decision from PERB, the Authority, in an emergency, would be subordinate to the Mayor for personnel actions and free to implement changes to the working conditions of union employees, without bargaining with the union. The abandonment of the vaccination requirement does not change the effect of the PERB decision, on the rights of unions to bargain over issues, under the CMPA. As PERB stated in *Opinion 1811*, J.A. 14,

The court reasoned that the COVID-19 Emergency Act did not need to enumerate the specific actions management can take in an emergency because, under D.C. Official Code § 1-617.08(a)(6), management already has “flexible, expansive, open-ended authority to take ‘whatever actions may be necessary’ to address” the COVID-19 emergency. In AFGE, Local 631 and OLRCB, the Board found that the COVID-19 Emergency Act merely restates management’s pre-existing authority under D.C. Official Code § 1-617.08(a)(6) and applies that authority to the specific COVID-19 emergency.

Without the opinion being reversed, Local 872 will continue to be affected by this decision, when an emergency arises, under the CMPA. The expiration of the COVID Emergency Response Act does not correct the ruling, of unilateral implementation, raised by this appeal and does not correct the erroneous interpretation and application of the CMPA. Management rights, under the CMPA, have been held to be subject to bargaining, prior to implementation of changes to



working conditions, *American Federation of Government Employees, AFL-CIO Local 631, et. al v. D.C. Water and Sewer Authority*, PERB Case No. 22-U-18, Slip Op. 1837, at 6-7 (Apr. 27, 2023). Local 872 requests the court reverse the decision in this matter, which was based upon an error of law. PERB's ruling, and the Superior Court ruling, if not reversed, permits the Authority to unilaterally impose changes on union employees, in an emergency.

### **Conclusion**

Local 872, based upon the foregoing and the record in this matter, respectfully requests the PERB decision in this matter be reversed and this case be remanded to PERB with instruction to reverse PERB Opinion 1811 and issue a decision, referring the parties to expedited interest arbitration.

Respectfully,

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**CERTIFICATE OF SERVICE**

The foregoing Reply Brief of Appellant was served upon counsel for the D.C. Public Employee Relations Board and the D.C. Water and Sewer Authority, through the court's electronic filing system, addressed to:

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This 21st day of December 2023.

/s/Barbara B. Hutchinson  
Barbara B. Hutchinson

# District of Columbia Court of Appeals

## REDACTION CERTIFICATE DISCLOSURE FORM

**Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a “CV” docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.**

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:
  - An individual’s social-security number
  - Taxpayer-identification number
  - Driver’s license or non-driver’s’ license identification card number
  - Birth date
  - The name of an individual known to be a minor
  - Financial account numbers, except that a party or nonparty making the filing may include the following:
    - (1) the acronym “SS#” where the individual’s social-security number would have been included;
    - (2) the acronym “TID#” where the individual’s taxpayer-identification number would have been included;
    - (3) the acronym “DL#” or “NDL#” where the individual’s driver’s license or non-driver’s license identification card number would have been included;
    - (4) the year of the individual’s birth;
    - (5) the minor’s initials; and
    - (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.
3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.
4. Information about protection orders, restraining orders, and injunctions that “would be likely to publicly reveal the identity or location of the protected party,” 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining “protection order” to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).
5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.
6. Any other information required by law to be kept confidential or protected from public disclosure.

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23-CV-185  
Case Number(s)

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