No. 22-CV-605

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 631,
APPELLANT,

v.

DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD; DISTRICT OF COLUMBIA OFFICE OF LABOR RELATIONS AND COLLECTIVE BARGAINING,
APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE DISTRICT OF COLUMBIA OFFICE OF LABOR RELATIONS AND COLLECTIVE BARGAINING

BRIAN L. SCHWALB
Attorney General for the District of Columbia

CAROLINE S. VAN ZILE
Solicitor General

ASHWIN P. PHATAK
Principal Deputy Solicitor General

THAIS-LYN TRAYER
Deputy Solicitor General

*HOLLY M. JOHNSON
Senior Assistant Attorney General
Office of the Solicitor General

Office of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 442-9890
holly.johnson@dc.gov

*Counsel expected to argue

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

---

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes and Regulations

Other

INTRODUCTION AND STATEMENT OF THE ISSUES

Vaccines for the deadly COVID-19 virus became widely available to adults in April 2021. That summer, most District of Columbia employees who had been teleworking returned to the workplace. To protect those employees and the public they serve, Mayor Muriel Bowser ordered all employees under her authority to either become vaccinated or submit weekly COVID-19 test results.

The District invited the American Federation of Government Employees ("AFGE") to engage in limited collective bargaining regarding the "impact and effects" of this requirement. AFGE declined, instead demanding full, substantive bargaining, which would have prevented the District from implementing the requirement if it did not agree to AFGE's demands. When the District refused to engage in substantive bargaining, AFGE filed a negotiability appeal with the District of Columbia Public Employee Relations Board ("PERB").

PERB held that the District was not required to engage in *any* bargaining—not even over "impact and effects"—because the vaccine-or-test requirement was authorized by emergency legislation that applied "notwithstanding" ordinary labor law. After that, AFGE abandoned its claim for substantive bargaining and, in its appeals to the Superior Court and this Court, pursued only the right to "impact and effects" bargaining.

The emergency legislation expired in February 2022 and the vaccine-or-test requirement was later lifted. In light of those events, AFGE's appeal raises only two issues:

1. Whether this Court should dismiss the appeal as moot, either because the vaccine-or-test requirement has been lifted and AFGE's only preserved claim rests on the interpretation of expired emergency legislation, or because, in any event, this Court cannot provide AFGE meaningful relief because the District has already satisfied its obligation to engage in "impact and effects" bargaining.

2. Alternatively, if this Court chooses to reach AFGE's forfeited claim, whether PERB properly rejected AFGE's claim of entitlement to substantive bargaining because the vaccine-or-test requirement was implemented under a sole management right to take any necessary action in response to an emergency.

STATEMENT OF THE CASE

AFGE filed its negotiability appeal with PERB on October 19, 2021, claiming that the vaccination requirement was fully negotiable.[1] Joint Appendix ("JA") 13-28. The District opposed, arguing that, because it was exercising a sole management right, it was only required to bargain over the "impact and effects" of the requirement. JA 35-67.

---

[1] AFGE also claimed that numerous other conditions of employment related to the COVID-19 pandemic were negotiable. *See* JA 15-28. AFGE does not pursue those claims in this appeal.

On December 21, PERB ruled that the District could unilaterally impose the requirement without engaging in *any* collective bargaining, "even over impact and effects." JA 6. AFGE moved PERB to reconsider whether the District was required to bargain over "impact and implementation"—a federal-sector phrase synonymous with "impact and effects," *see, e.g.*, *Nat'l Treasury Emps. Union v. FLRA*, 414 F.3d 50, 53 (D.C. Cir. 2005). JA 73. PERB denied the motion. Administrative Record ("AR") 326.

On January 20, 2022, AFGE filed a timely petition for review in the Superior Court that claimed only a right to "impact and effects" bargaining. JA 82-89. On July 13, the Superior Court upheld PERB's decision. JA 8-12. On August 12, AFGE filed this timely appeal.

STATEMENT OF FACTS

1. Statutory Overview.

Labor relations between the District and its employees are governed by the Comprehensive Merit Personnel Act ("CMPA"), D.C. Code § 1-617.01 *et seq*. The CMPA requires two distinct types of collective bargaining. *First*, for matters that are fully negotiable, management must engage in substantive bargaining before it can change any terms or conditions of employment of unionized employees. *See* D.C. Code § 1-617.04(a)(5) (requiring management to "bargain collectively in good faith"); *UDC Fac. Assoc. v. UDC*, 45 DCR 4771, slip op. No. 517 at 2, PERB Case

No. 97-U-12 (May 15, 1997) (prohibiting management from implementing a fully negotiable change until an agreement is reached).[2] If the parties reach impasse, the dispute must be submitted to PERB for "impasse resolution"—usually binding arbitration. D.C. Code § 1-617.02(c).

Second, for matters that are not fully negotiable, management must provide the affected unions "an opportunity to bargain over the impact and effects" regarding "the implementation of those management rights." *FOP/MPD Labor Comm. v. MPD*, 52 D.C. Reg. 2517, slip op. No. 736 at 6, PERB Case No. 02-U-11 (Oct. 15, 2004). This limited type of bargaining is required only upon request and, so long as management has bargained in good faith, it can implement the change even if the parties do not reach agreement. *UDC Fac. Assoc.*, slip op. at 2.

"All matters shall be deemed [fully] negotiable"—and thus subject to substantive bargaining—except for a list of rights reserved to management. D.C. Code § 1-617.08(b). For those "sole" management rights, the District need only engage in "impact and effects" bargaining. *See Int'l Bhd. of Police Officers, Loc. 446 v. D.C. Gen. Hosp.*, 41 D.C. Reg. 2321, slip op. 312 at 4 n.7, PERB Case No. 91-U-06 (May 27, 1992) (explaining that the right to "impact or effects" bargaining

---

[2] For matters this Court has not yet considered, the District cites PERB's interpretation of the CMPA, which is entitled to deference. *D.C. Metro. Police Dep't v. PERB*, 144 A.3d 14, 17 (D.C. 2016). All PERB decisions cited in this brief are reproduced in the attached addendum.

"arises from the general right to bargain over . . . terms and conditions"). These include the right to: "direct employees"; "hire, promote, transfer, assign, and retain employees"; "suspend, demote, discharge, or take other disciplinary action against employees"; "relieve employees of duties because of lack of work"; "maintain the efficiency" of governmental operations; and, as relevant here, to "take whatever actions may be necessary to carry out the mission of the District government in emergency situations." *Id.* § 1-617.08(a).

On March 17, 2020, the Council enacted the COVID-19 Response Emergency Amendment Act of 2020 ("COVID Emergency Act"), D.C. Act 23-247, § 301(a)(4)(16), 67 D.C. Reg. 3093 (March 20, 2020), which authorized the Mayor to take personnel actions "necessary and appropriate to address the emergency" "[n]otwithstanding any provision of [the CMPA] or the rules issued pursuant to the CMPA." *Id.* § 301(a)(4)(16), 67 D.C. Reg. at 3098 (codified at D.C. Code § 7-2304(b)(16)). Such emergency personnel actions included redeploying employees, modifying their tours of duty or places of duty, mandating telework, extending and assigning additional shifts, providing meals to employees, assigning additional duties, extending existing terms of employment, hiring new employees without competition, eliminating annuity offsets, and denying leave or rescinding previously approved leave. *Id.* That emergency legislation was later replaced by temporary legislation, containing identical language, that extended this authority until February

4, 2022. Coronavirus Support Temporary Amendment Act of 2021, D.C. Law 24-9, § 507(a), 68 D.C. Reg. 4824, 4874-75 (May 7, 2021).

In *Office of Labor Relations & Collective Bargaining ("OLRCB") v. PERB*, No. 2020 CA 3086 P(MPA) (D.C. Super. Ct. Sept. 29, 2021), PERB interpreted the COVID Emergency Act as authorizing the emergency personnel actions "*subject to* the requirements of the CMPA." JA 129. But the Superior Court rejected that interpretation, holding that the Act's "notwithstanding" clause "removes the personnel actions listed in § 7-2304(b)(16) from the scope of the CMPA and relieves [the District] of any obligation under the CMPA to bargain impact and effects of these management decisions." JA 128-29.

2. As District Employees Return To The Workplace, Mayor Bowser Issues A Vaccine-Or-Test Requirement.

On March 11, 2020, the World Health Organization declared the COVID-19 outbreak a global pandemic. *See* JA 29; AR 24. The U.S. Department of Health and Human Services had already declared a public health emergency and, that same day, Mayor Bowser declared a public emergency in the District of Columbia. AR 156. Within days, more than half of the District's workforce retreated to their homes to reduce the spread of the deadly virus. For the next 16 months, these employees worked remotely as the world waited for the development of safe and effective vaccines. *See* JA 30; AR 24, 158.

Vaccines were authorized for sensitive populations in early 2021, and by April were widely available to adults in and around the District. Lucien J. Dhooge, *Pushing the Needle: Vaccination Mandates in the Age of COVID*, 59 San Diego L. Rev. 481, 494-95 (2022). In July, Mayor Bowser ordered employees under her control to return to the workplace. JA 30. Then, on August 10, she issued Mayor's Order 2021-099, ordering all employees under her authority to "provide proof . . . that they have received a full course of a vaccination against COVID-19" unless "granted an exemption from such vaccination." JA 30. Exemptions could be based on "sincerely held religious beliefs," conditions making vaccination "medically inadvisable," or an "agree[ment] to be tested weekly for COVID-19." JA 30-31. The Mayor explained that "[v]accination remains the most important tool in fighting the spread of COVID-19," and that this requirement was "vital" "to help ensure the effective and efficient operation of the District government[,] and for [the employees'] own safety, the safety of their colleagues, and the safety of those they serve." JA 30.

3. AFGE Declines The District's Invitation To Participate In "Impact And Effects" Bargaining, Instead Demanding Substantive Bargaining.

The next day, on August 11, the District notified the affected unions that, because the vaccine-or-test requirement was a "management right," it was not subject to substantive bargaining. AR 150. The District invited the unions to submit

proposals "if [they] demand to bargain over the impact and effects" of the requirement. AR 150.

AFGE "informed the District the matter was fully negotiable as a health and safety matter." JA 14-15. For the next two months, the parties attempted to negotiate the vaccine requirement, but could not reach agreement regarding the type of bargaining the District was required to provide. JA 15. In early October, the parties exchanged "last best offers." AR 30-58; *see* JA 15-28. The District reiterated its decision not to engage in substantive bargaining, explaining that the vaccine-or-test requirement was "an exercise of management's rights" to "determine security practices," "determine the efficiency of government operations," and "take whatever actions may be necessary to carry out the mission of the District government in emergency situations." AR 31 (citing D.C. Code § 1-617.08(a)). In its "last best offer," AFGE confirmed that it "has rejected . . . impact and implementation" bargaining. AR 30.

4. PERB Holds That The Vaccine-Or-Test Requirement Is Not Subject To *Any* Bargaining, Even Over Its "Impact And Effects."

On October 19, AFGE filed a negotiability appeal with PERB, claiming that the vaccine-or-test requirement was "fully negotiable" as a "safety and health matter." JA 16. In response, the District argued that the vaccine requirement was "an exercise of [m]anagement's rights to (a) determine its internal security (b) maintain the efficiency of government operations and (c) take whatever action it

deems necessary to carry out the District mission in an emergency." JA 36. It asked PERB to "rule that the scope of bargaining between the parties is therefore limited to impact and effects." JA 36.

On December 21, PERB held that the District could "unilaterally" implement the vaccine-or-test requirement. JA 6. The District was not required to engage in substantive bargaining because one of the "sole" rights listed in the CMPA "authorizes management to 'take whatever actions may be necessary to carry out the mission of the District government in emergency situations.'" JA 6 (citing D.C. Code § 1-617.08(a)(6)). Indeed, PERB held, the District was not even required to bargain over "impact and effects" because the vaccine requirement was covered by the COVID Emergency Act, which authorized management to respond to the emergency "'notwithstanding' any contradictory provision of the CMPA." JA 6 (quoting D.C. Code § 7-2304) (citing *OLRCB*, No. 2020-CA-3086, at 7-8).

AFGE moved PERB to "reconsider its decision that the . . . vaccine mandate was not subject to impact and implementation bargaining." JA 73. AFGE conceded that the COVID Emergency Act "permitted unilateral implementation of the personnel actions listed" in the Act, JA 72, but argued that "[a] vaccine requirement would not fall within [those] specific actions," JA 74 (citing D.C. Code § 7-2304(b)(16)). PERB denied the motion, explaining that it was following the Superior Court's decision in *OLRCB*, which held that the Act "gives management

the sole right to take any necessary personnel action in emergency situations," including a "'flexible, expansive, open-ended authority' to take 'whatever actions may be necessary' to address" the COVID-19 emergency. AR 326 (quoting *OLRCB*, No. 2020-CA-3086, at 6-7).

5. The Superior Court Affirms PERB's Ruling That The Vaccine-Or-Test Requirement Was Not Subject To Substantive Bargaining But Does Not Address PERB's Ruling Regarding "Impact And Effects" Bargaining.

While its motion for reconsideration was pending before PERB, AFGE filed a timely petition for review in the Superior Court. JA 2. AFGE did not challenge PERB's ruling that the vaccine-or-test requirement was a management right and did not argue that it was entitled to substantive bargaining, nor did it argue that the requirement was somehow substantively illegal or unauthorized. JA 82-90, 118-20. Instead, it appealed only PERB's ruling that the District was not required to engage in "impact and implementation" bargaining. JA 87-89. PERB defended that decision. JA 91-103. And the District maintained the position it had taken before PERB—that the vaccine requirement was a sole management right and thus was not subject to *substantive* bargaining. JA 104-17.

The Superior Court denied AFGE's petition, holding that the vaccination requirement was exercised under the District's sole management right to "take whatever actions may be necessary to carry out the mission of the District government in emergency situations." JA 11 (quoting D.C. Code § 1-617.08(a)(6)).

The court found substantial evidence to support PERB's conclusion that the COVID pandemic was "unquestionably an 'emergency'" and that the vaccine-or-test requirement was "necessary" because "the District's operations are highly dependent on the availability of a healthy workforce." JA 11.

The court did not address the sole issue raised by AFGE: whether the District was required to engage in "impact and effects" bargaining. *See* JA 8-12.

6. The Emergency Act Expires; The Vaccine-Or-Test Requirement Is Suspended; And The Public Emergencies Declared By The District And The United States Come To An End.

On February 4, 2022, while the parties were briefing the matter in the Superior Court, the temporary legislation that had replaced the COVID Emergency Act expired. 68 D.C. Reg. at 4898. Seven months later, on September 14, the District rescinded the vaccine requirement. JA 121.

The District's public emergency ended on April 16, 2022. Mayor's Order 2022-043 (attached in addendum). The federal public health emergency ended on May 11, 2023. *See Fact Sheet: End of the COVID-19 Public Health Emergency*, U.S. Dep't of Health and Human Servs., https://tinyurl.com/3p4e2wwe.

STANDARD OF REVIEW

"[W]hile an appeal is pending, an event that renders relief impossible or unnecessary also renders that appeal moot." *FOP, Metro. Labor Comm. v. District of Columbia*, 82 A.3d 803, 813 (D.C. 2014) (quoting *Settlemire v. D.C. Off. of Emp.*

Appeals, 898 A.2d 902, 905 (D.C. 2006)) (brackets in original). "Mootness is a question of law which [this Court] review[s] de novo." *Id.* at 814.

"[T]his [C]ourt will not easily disturb a decision of the PERB." *D.C. Metro. Police Dep't v. PERB*, 144 A.3d 14, 17 (D.C. 2016) (quoting *FOP/Dep't of Corr. Lab. Comm. v. PERB*, 973 A.2d 174, 176 (D.C. 2009)). The Court "must sustain [PERB's] decision if it is supported by substantial evidence in the record as a whole and not clearly erroneous as a matter of law." *Gibson v. PERB*, 785 A.2d 1238, 1241 (D.C. 2001). And it "defer[s] to [PERB's] interpretation of the CMPA unless the interpretation is unreasonable in light of the prevailing law or inconsistent with the statute or is plainly erroneous." *D.C. Metro. Police Dep't*, 144 A.3d at 17 (quoting *Doctors Council of the D.C. Gen. Hosp. v. PERB*, 914 A.2d 682, 695 (D.C. 2007)). "Put differently, [the Court] will only set aside a decision of the PERB if it is 'rationally indefensible.'" *Id.* (quoting *Drivers, Chauffeurs, & Helpers Loc. Union No. 639 v. District of Columbia*, 631 A.2d 1205, 1216 (D.C. 1993)).

SUMMARY OF ARGUMENT

1. This Court should dismiss this appeal as moot. AFGE has preserved only one claim for appeal: whether the District was required to engage in "impact and effects" bargaining. Now that the vaccine-or-test requirement has been lifted and the COVID Emergency Act has expired, there is no live controversy regarding the that obligation.

Nor is this issue capable of repetition yet evading review. Whether the District was required to engage in "impact and effects" bargaining rests on whether the COVID Emergency Act authorized the Mayor to issue the vaccine requirement. PERB interprets the Act as broadly authorizing the action, while AFGE urges a narrower construction of the Act. But the Act has expired, as has the vaccine mandate. Even if it is reasonable to assume that a new global pandemic could lead the Mayor to issue a similar order, it is not reasonable to assume that the Council would enact emergency legislation containing the exact same language.

Alternatively, this issue is moot because the District has already provided AFGE the only relief that this Court could award. AFGE demands "impact and effects" bargaining, but AFGE rejected such bargaining when it was offered by the District. Even if this Court were to adopt AFGE's interpretation of the COVID Emergency Act, its ruling would have no effect on the rights of AFGE or the District.

2. Alternatively, if this Court chooses to reach AFGE's forfeited claim for full, substantive bargaining, it should affirm PERB's holding that the District had a sole management right to implement the vaccine-or-test requirement because it was necessary to carry out the District's mission an emergency situation. The COVID-19 pandemic was indisputably an emergency throughout the time the vaccine requirement was in effect, and PERB had ample reason to find that it was necessary to protect employees and the public as District employees returned to the workplace.

ARGUMENT

I. The Sole Claim AFGE Has Preserved For Appeal Should Be Dismissed As Moot Because It Rests On An Expired Statute And, In Any Event, The District Has Already Provided The Relief AFGE Pursues.

A. AFGE has preserved only one claim: whether the District was required to engage in "impact and effects" bargaining.

PERB's decision contains two rulings. *First*, it held that the District was not required to engage in substantive bargaining because the CMPA grants the District a sole management right to "take whatever actions may be necessary to carry out the mission of the District government in emergency situations." JA 6 (quoting D.C. Code § 1-617.08(a)(6)). *Second*, PERB held that the District was not required to engage in "impact and effects" bargaining because the COVID Emergency Act authorized the vaccine-or-test requirement "notwithstanding" the typical bargaining requirements of the CMPA. JA 6 (quoting D.C. Code § 7-2304(b)(16)).

AFGE has forfeited any challenge to PERB's first ruling. Although it originally asked PERB to hold that the vaccine-or-test requirement was subject to full, substantive bargaining, AFGE forfeited its right to challenge PERB's denial of that claim by failing to raise it in the Superior Court, *see Dupree v. D.C. Dep't of Corr.*, 132 A.3d 150, 157 (D.C. 2016), or this Court, *see Comford v. United States*, 947 A.2d 1181, 1188 (D.C. 2008). In the Superior Court, AFGE challenged only PERB's holding that the COVID Emergency Act authorized the District to "unilaterally" implement the vaccine requirement without engaging in "impact and

effects" bargaining.[3] *See* JA 82-89, 118-20. AFGE argued that the District had never disputed its duty to engage in this limited type of bargaining, *see* JA 86-87, and had in fact "invited" the unions to participate in such bargaining, JA 118-19. But when the parties asked PERB to determine "whether the vaccination requirement was subject to full bargaining or subject to impact and implementation bargaining," JA 87, PERB went beyond that question and held that the District need not even engage in "impact and effects" bargaining. JA 86-89. AFGE did not, in any of its Superior Court filings, claim a right to *substantive* bargaining over the vaccine requirement. *See* JA 82-90, 118-20. At that point, AFGE had forfeited any right to seek substantive bargaining in this appeal. *See Dupree*, 132 A.3d at 157.

AFGE's brief in this Court likewise claims only that AFGE "was entitled to impact and implementation bargaining." Br. 9. In support of that claim, it makes two arguments. Despite the title of its first argument—"A Vaccination Requirement Must Be Enacted By A Legislature," Br. 6—AFGE does not actually assert that the Mayor lacked authority to issue the vaccine-or-test requirement.[4] *See* Br. 6-9.

---

[3] Throughout its brief, AFGE uses the word "unilateral" to describe an action taken without *any* collective bargaining, even over "impact and effects." *See, e.g.*, Br. 4 (noting that the District "did not assert that management had a unilateral right to impose a vaccine requirement" but instead conceded that the vaccine requirement was "subject to impact and implementation bargaining").

[4] This heading appears to arise from a Supreme Court decision staying an emergency order issued by the U.S. Occupational Safety and Health Administration

Instead, it argues that the *COVID Emergency Act* "did not include any authority for vaccine requirement" and that the CMPA's "management rights provisions" require "impact and implementation bargaining." Br. 8-9. Thus, AFGE argues, it "was entitled to impact and implementation bargaining for the vaccination requirement."[5] Br. 9.

AFGE's second argument—titled "A Statute Cannot Be Amended By Implication"—similarly pursues only "impact and effects" bargaining. Br. 9. This portion of AFGE's brief is based entirely on the COVID Emergency Act, which AFGE argues does not authorize a vaccine-or-test requirement and thus did not relieve the District of its obligation under the CMPA to engage in "impact and effects" bargaining. Br. 11 (citing D.C. Code § 1-617.08(a)(6)).

("OSHA") requiring *private* employers to impose a vaccine requirement. *See* Br. 7-8 (citing *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 665 (2022)). But while the Court declined to "expand OSHA's regulatory authority without clear congressional authorization," *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665, AFGE does not argue that the Mayor lacked authority to impose the vaccine requirement on her own workforce, *even if she engaged in collective bargaining*.

[5] AFGE's brief suggests that the vaccine requirement expired after 15 days because the Council did not, within that time, adopt emergency legislation ratifying it. Br. 6 (citing D.C. Code § 7-2306(a) to (b)). Any such claim is forfeited because AFGE did not raise it before PERB or in the Superior Court. *See* JA 13-28, 82-90, 118-20; *Dupree*, 132 A.3d at 157. Instead, AFGE's negotiability appeal necessarily assumed that the CMPA authorized the Mayor to issue the vaccine requirement, and a contrary claim would have conflicted with AFGE's claim of entitlement to collective bargaining over the (presumably lawful) personnel action.

To the extent that AFGE is attempting to argue that the vaccine-or-test mandate was *substantively* unauthorized or illegal—which was not the subject of any of the bargaining-related proceedings below—that claim comes far too late. It is black-letter law in administrative appeals that all legal issues must first be raised before the relevant administrative agency. *See Black v. D.C. Dep't of Hum. Servs.*, 188 A.3d 840, 847 (D.C. 2018). AFGE thus has forfeited any such argument twice over by failing to raise it before PERB or the Superior Court. *See* JA 13-28, 72-75, 82-90, 118-20. Nor would the argument have merit because the CMPA authorizes the Mayor to "take whatever actions may be necessary to carry out the mission of the District government in emergency situations," D.C. Code § 1-617.08(a)(6). The vaccine-or-test requirement is plainly such an action.

In sum, AFGE has plainly forfeited any challenge to PERB's ruling that the vaccine requirement was the exercise of a sole management right. As such, the only issue on appeal is whether the now-expired COVID Emergency Act relieved the District from the CMPA's requirement that it engage in "impact and effects" bargaining. This issue is now moot.

B. AFGE's "impact and effects" claim is moot because the vaccine-or-test requirement has been lifted and the claim is not capable of repetition because it rests on an expired emergency statute.

When the vaccine-or-test requirement was lifted in September 2022, AFGE's claim became moot. *See Holley v. United States*, 442 A.2d 106, 107 (D.C. 1981)

("Where . . . an appellate decision will not affect the rights and duties of the litigants, there is no longer a live controversy."). "Although not bound strictly by the 'case or controversy' requirements of Article III of the U.S. Constitution, this [C]ourt does not normally decide moot cases." *Cropp v. Williams*, 841 A.2d 328, 330 (D.C. 2004). "Unless there is a possibility that further penalties or legal disabilities can be imposed as a result of the judgment, this [C]ourt may not render in the abstract an advisory opinion." *McClain v. United States*, 601 A.2d 80, 81 (D.C. 1992) (quoting *Holley*, 442 A.2d at 107).

Recent events have rendered this case moot for at least two reasons. *First*, the vaccine-or-test requirement has been lifted. It no longer exists. For that reason alone, an order to engage in "impact and effects" bargaining over the now-defunct mandate would be futile. This Court can therefore offer no meaningful relief, making the case moot. *See Settlemire*, 898 A.2d at 907.

Second, the statute that purportedly relieved the District of the obligation to engage in "impact and effects" bargaining has expired, further rendering the issue moot and making it unlikely to arise again in the future. PERB and AFGE agree that whether the District was required to engage in "impact and effects" bargaining rests entirely on whether the COVID Emergency Act authorized the Mayor to implement the vaccine requirement. *See* Br. 9 (arguing that, because the COVID Emergency Act "did not include any authority for a vaccination requirement," "the management

rights provisions [of the CMPA] required impact and implementation bargaining"); JA 6 (PERB's negotiability decision, adopting an interpretation of the COVID Emergency Act that "'g[ave] management the sole right to take any necessary personnel action in emergency situations,' 'notwithstanding' any contradictory provision of the CMPA"), 74 (AFGE's motion for reconsideration, arguing that PERB misinterpreted the COVID Emergency Act because "[a] vaccination requirement would not fall within the specific actions listed"), 87 (AFGE's Superior Court brief, making a similar argument), 91 (PERB's Superior Court brief, arguing that the COVID Emergency Act should be broadly interpreted to encompass the vaccine requirement).[6] The COVID Emergency Act expired on February 4, 2022, making the issue moot. 68 D.C. Reg. at 4898.

Nor is the issue "capable of repetition, yet evading review." *See McClain*, 601 A.2d at 82. The public health emergency is over, making a renewed vaccine mandate unlikely. But even assuming that, in the future, a new global pandemic would prompt the Mayor to implement a new vaccine requirement, whether AFGE would be entitled to "impact and effects" bargaining would necessarily be based on whether some other provision of law, not yet in existence, excused the District from

---

[6] The District did not argue below that the COVID Emergency Act relieved it from "impact and effects" bargaining over the vaccine requirement. It did, however, argue that the Act authorized the vaccine requirement by permitting the Mayor to assign "additional duties." JA 112 (quoting D.C. Code § 7-2304(b)(16)(G)).

that obligation. Even assuming that, in such a scenario, the Council would enact new emergency legislation, there is no reason to believe that it would be *identical* to the COVID Emergency Act. Thus, there is no reasonable possibility that this same question will arise in future cases.

"[T]here is no justiciable controversy if the court is asked to decide only abstract or academic issues." *Thorn v. Walker*, 912 A.2d 1192, 1195 (D.C. 2006). And nothing could be more abstract or academic than whether an expired statute should be interpreted to authorize a personnel action that is no longer in effect.

C. Alternatively, the District's obligation to bargain over the "impact and effects" of the vaccine-or-test requirement is moot because the District has already satisfied that obligation.

AFGE's "impact and effects" claim is moot for a second, independent reason: the District has already provided AFGE any relief this Court could bestow. "[I]f a party has requested no particular relief on appeal, or the appellate court can provide no effective relief, the case is moot." *Thorn*, 912 A.2d at 1195. For example, "an agency's production of all requested non-privileged documents moots a FOIA case," *FOP v. District of Columbia*, 113 A.3d 195, 199 (D.C. 2015), a party's compliance with a judgment requiring specific performance moots an appeal, *see Thorn*, 912 A.2d at 1196-97, and a prisoner's completion of his sentence moots his challenge to the denial of probation, *Smith v. United States*, 454 A.2d 1354, 1356 (D.C. 1983).

The District has already satisfied any obligation it might have had to engage in "impact and effects" bargaining over the vaccine-or-test requirement. "[U]nions enjoy the right to engage in impact and effects bargaining . . . only if they make a timely request to bargain." *FOP/MPD Labor Comm.*, slip op. No. 736 at 6; *see AFGE Loc. Union No. 383 v. D.C. Dep't of Hum. Servs.*, 49 D.C. Reg. 770, slip op. No. 418 at 4 (Mar. 29, 1995) ("The effects and impact of a non-bargainable management decision upon terms and conditions of employment . . . are bargainable only upon request.").[7]

If, as AFGE claims, the District was required to engage in "impact and effects" bargaining over the vaccine-or-test requirement, it fully satisfied that obligation by inviting AFGE to engage in such bargaining and remaining willing to do so until AFGE explicitly rejected the offer. On August 11, 2021, the day after the Mayor issued the vaccine requirement, the District invited AFGE to participate in "impact and effects" bargaining. AR 150. AFGE responded by demanding substantive bargaining and "inform[ing] the District [that] the matter was fully negotiable as a health and safety matter." JA 14-15. The District rejected substantive bargaining but continued to offer "impact and effects" bargaining. *See*

---

[7] "In contrast, when management unilaterally and without notice implements a change in established and bargainable terms and conditions of employment, a request to bargain is not required to establish a failure to bargain in good faith." *AFGE Loc. Union No. 383*, slip op. No. 418 at 4 n.3.

JA 15-16 (AFGE's negotiability appeal, stating that the District "seeks to limit the scope of negotiation on the vaccine requirement to impact and implementation"). Then, in its "last best offer," AFGE explicitly "rejected [the District's] claim of impact and implementation." AR 30.

As discussed, in this appeal AFGE only seeks "impact and effects" bargaining. But because the District has satisfied any obligation to engage in that type of bargaining, even if this Court were to agree with AFGE's legal arguments, it cannot provide AFGE any meaningful relief. *See Thorn*, 912 A.2d at 1195. Indeed, AFGE conceded below that the District was willing to engage in "impact and effects" bargaining, *see* JA 15-16, such that even a declaratory judgment in AFGE's favor could not, for example, form the basis of an unfair labor practice claim, and would therefore amount to nothing more than an advisory opinion. *See* D.C. Code § 1-617.04(a)(5) (making it an "[u]nfair labor practice[]" for the District to "[r]efus[e] to bargain collectively in good faith"). Nor could AFGE demand new "impact and effects" bargaining over the vaccine-or-test requirement because the requirement no longer exists. AFGE cannot gain any meaningful relief from this appeal beyond vindication in its battle with PERB over the interpretation of the now-expired COVID Emergency Act. That is not a valid basis for this Court's intervention. *See Settlemire*, 898 A.2d at 907 (explaining that a "desire for vindication is . . . inadequate to show that [an] appeal is not moot").

II. Alternatively, This Court Should Affirm PERB's Holding That The Vaccine-Or-Test Requirement Was Not Subject To Full, Substantive Bargaining Because It Was The Exercise Of A Sole Management Right.

For the reasons described, AFGE has forfeited its argument before PERB that the vaccine-or-test requirement was "fully negotiable" as a "safety and health matter." JA 16. If this Court nevertheless chooses to decide AFGE's forfeited challenge, it should affirm PERB's holding that the District was not required to engage in full, substantive bargaining because the vaccine requirement was necessary to carry out the mission of the District during the COVID-19 emergency. AFGE concedes that the District is not required to engage in substantive bargaining over any matter that falls under a sole management right. *See* JA 120 ("Management rights are permissive subjects of bargaining."). One such management right is "[t]o take whatever actions may be necessary to carry out the mission of the District government in emergency situations."[8] D.C. Code § 1-617.08(a)(6). And AFGE does not challenge PERB's holding that the vaccine requirement was indeed necessary in light of the public health emergency.

PERB's decision, which is reviewed under this Court's "substantial evidence" test, *Gibson*, 785 A.2d at 1241, is amply supported by the record. The COVID-19

---

[8] The District also advanced and preserved before PERB its position that the vaccine requirement constituted an exercise of its sole management rights to "maintain the efficiency of . . . government operations," D.C. Code § 1-617.08(a)(4), and "determine . . . internal security practices," *id.* § 1-617.08(a)(5), although PERB did not reach those grounds, *see* JA 5-7.

pandemic was indisputably an "emergency situation" throughout the time the vaccine requirement was in effect. When Mayor Bowser issued the vaccine-or-test requirement, "more than 35.8 million Americans ha[d] been diagnosed with COVID-19 and more than 616,000 ha[d] died from the disease." JA 29. More than 51,000 people had been infected in the District and, "tragically, 1,149 District residents ha[d] lost their lives." JA 29. And the vaccine requirement was lifted on September 14, 2022, JA 121, seven months before the federal government declared an end to the public health emergency, *see Fact Sheet: End of the COVID-19 Public Health Emergency*, U.S. Dep't of Health and Human Services, https://tinyurl.com/3p4e2wwe.

PERB also had more than enough evidence to find the vaccine-or-test requirement "necessary to carry out the mission of the District government." D.C. Code § 1-617.08(a)(6). When vaccines became widely available, the District "initiated an aggressive campaign to get residents and employees vaccinated," which was "the most important tool in fighting the spread of COVID-19." JA 30. Then, in July 2021, more than half of the District's workforce returned to the workplace. JA 30. At that point, it became "vital that District employees . . . be vaccinated against COVID-19 or undergo regular testing for COVID-19, to help ensure the effective and efficient operation of the District government and for their own safety, the safety of their colleagues, and the safety of those they serve." JA 30. Presented

with these undisputed facts, PERB properly found that the vaccine requirement was the exercise of a sole management right. JA 6 (citing D.C. Code § 1-617.08(a)(6)); AR 326 (same).

AFGE has never claimed otherwise. *See* Br. 6-13. Indeed, even when it sought full, substantive bargaining before PERB, it argued only that "the District did not rely upon § 1-617.08(a)(6) during negotiations." JA 16; *see also* JA 15 n.1 (noting that the District first mentioned Section 1-617.08(a)(6) in its last best offer). But AFGE did not argue, much less offer authority, that the District's undisputed invocation of this provision at this stage in the negotiations somehow undermined its position that the vaccine-or-test requirement was in fact the exercise of a sole management right.

Instead, AFGE broadly claimed that the vaccine requirement was fully negotiable as "a safety and health matter." JA 16 (citing *Wash. Tchr.'s Union Loc. No. 6 v. D.C. Pub. Schs.*, 67 D.C. Reg. 14055, slip op. No. 1762 at 3, PERB Case No. 20-U-30 (Oct. 29, 2020)). But it did not offer any authority suggesting that a policy affecting "safety and health," which would ordinarily be fully negotiable, could not in some circumstances be the exercise of a sole management right and thus subject only to "impact and effects" bargaining. *See id.* Instead, AFGE relied entirely on a PERB decision that deferred to a hearing examiner's holding that the District had committed an unfair labor practice by failing to engage in *either* type of

bargaining. *See Wash. Tchr.'s Union Loc. # 6*, slip op. No. 1762 at 2. PERB did not, in that decision, indicate whether the District would have committed an unfair labor practice if it had properly participated in "impact and effects" bargaining. *See id.*

In short, AFGE has offered no authority, or even reasoned argument, suggesting that PERB was unreasonable in its holding that the vaccine-or-test requirement was "necessary to carry out the mission of the District government in emergency situations." JA 6 (quoting D.C. Code § 1-617.08(a)(6)). If this Court reaches that forfeited claim, it should affirm.

CONCLUSION

This appeal should be dismissed as moot or, in the alternative, the decision of the Superior Court should be affirmed.

Respectfully submitted,

BRIAN L. SCHWALB
Attorney General for the District of Columbia

CAROLINE S. VAN ZILE
Solicitor General

ASHWIN P. PHATAK
Principal Deputy Solicitor General

THAIS-LYN TRAYER
Deputy Solicitor General

/s/ Holly M. Johnson
HOLLY M. JOHNSON
Senior Assistant Attorney General
Bar Number 476331
Office of the Solicitor General

Office of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 442-9890
(202) 715-7713 (fax)
holly.johnson@dc.gov

June 2023

ADDENDUM
Section 1 – Statutes

D.C. Code § 1-617.04

The Official Code is current through March 21, 2023

District of Columbia Official Code > Division I. Government of District. (Titles 1 — 10) > Title 1. Government Organization. (Chs. 1 — 15) > Chapter 6. Merit Personnel System. (Subchs. I — XXXVI) > Subchapter XVII. Labor-Management Relations. (§§ 1-617.01 — 1-617.18)

§ 1-617.04. Unfair labor practices.

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

(1) Interfering with, restraining, or coercing any employee in the exercise of the rights guaranteed by this subchapter;

(2) Dominating, interfering, or assisting in the formation, existence or administration of any labor organization, or contributing financial or other support to it, except that the District may permit employees to negotiate or confer with it during working hours without loss of time or pay;

(3) Discriminating in regard to hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization, except as otherwise provided in this chapter;

(4) Discharging or otherwise taking reprisal against an employee because he or she has signed or filed an affidavit, petition, or complaint or given any information or testimony under this subchapter; or

(5) Refusing to bargain collectively in good faith with the exclusive representative.

(b) Employees, labor organizations, their agents, or representatives are prohibited from:

(1) Interfering with, restraining, or coercing any employees or the District in the exercise of rights guaranteed by this subchapter;

(2) Causing or attempting to cause the District to discriminate against an employee in violation of § 1-617.06;

(3) Refusing to bargain collectively in good faith with the District if it has been designated in accordance with this chapter as the exclusive representative of employees in an appropriate unit;

(4) Engaging in a strike, or any other form of unauthorized work stoppage or slowdown, or in the case of a labor organization, its agents, or representatives

condoning any such activity by failing to take affirmative action to prevent or stop it; and

(5) Engaging in a strike or refusal to handle goods or perform services, or threatening, coercing or restraining any person with the object of forcing or requiring any person to cease, delay, or stop doing business with any other person or to force or to require an employer to recognize for recognition purposes a labor organization not recognized pursuant to the procedures set forth in § 1-617.06.

History

(Mar. 3, 1979, D.C. Law 2-139, § 1704, 25 DCR 5740; Sept. 18, 1998, D.C. Law 12-151, § 2(c), 45 DCR 4043; Oct. 1, 2002, D.C. Law 14-190, § 3832(b), 49 DCR 6968.)

Annotations

Notes

Prior Codifications.

1981 Ed., § 1-618.4.

1973 Ed., § 1-347.4.

Effect of amendments.

D.C. Law 14-190, in subsec. (a)(1), inserted “with” after “Interfering”.

Emergency legislation.

For temporary (90 day) amendment of section, see § 3732(b) of Fiscal Year 2003 Budget Support Emergency Act of 2002 (D.C. Act 14-453, July 23, 2002, 49 DCR 8026).

Legislative history of Law 2-139.

For legislative history of D.C. Law 2-139, see Historical and Statutory Notes following § 1-601.01.

Legislative history of Law 12-151.

For legislative history of D.C. Law 12-151, see Historical and Statutory Notes following § 1-605.02.

Legislative history of Law 14-190.

For Law 14-190, see notes following § 1-301.131.

D.C. Code § 1-617.08

The Official Code is current through March 21, 2023

District of Columbia Official Code > Division I. Government of District. (Titles 1 — 10) > Title 1. Government Organization. (Chs. 1 — 15) > Chapter 6. Merit Personnel System. (Subchs. I — XXXVI) > Subchapter XVII. Labor-Management Relations. (§§ 1-617.01 — 1-617.18)

§ 1-617.08. Management rights; matters subject to collective bargaining.

(a) The respective personnel authorities (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:

(A) The mission of the agency, its budget, its organization, the number of employees, and to establish the tour of duty;

(B) The number, types, and grades of positions of employees assigned to an agency's organizational unit, work project, or tour of duty;

(C) The technology of performing the agency's work; and

(D) The agency's internal security practices; and

(6) To take whatever actions may be necessary to carry out the mission of the District government in emergency situations.

(a-1) An act, exercise, or agreement of the respective personnel authorities (management) shall not be interpreted in any manner as a waiver of the sole management rights contained in subsection (a) of this section.

(b) All matters shall be deemed negotiable except those that are proscribed by this subchapter. Negotiations concerning compensation are authorized to the extent provided in § 1-617.16.

ENROLLED ORIGINAL

AN ACT

D.C. ACT 23-247

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MARCH 17, 2020

To provide, on an emergency basis, authority to the Executive and to address critical needs of District residents and businesses during the current public health emergency including wage replacement, business relief, and additional authorities and exemptions regarding health, public safety, and consumer protection.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "COVID-19 Response Emergency Amendment Act of 2020".

TITLE I. LABOR AND WORKFORCE PROTECTIONS

Sec. 101. Wage replacement.

(a) Notwithstanding any provision of District law, but subject to applicable federal laws and regulations, during a period of time for which the Mayor has declared a public health emergency pursuant to section 5a of the District of Columbia Public Emergency Act of 1980, effective October 17, 2002 (D.C. Law 14-194; D.C. Official Code § 7-2304.01), an affected employee shall be eligible for unemployment insurance in accordance with subsection (b) of this section.

(b)(1) Upon application, an affected employee shall receive unemployment insurance compensation ("UI"), which the Director of the Department of Employment Services shall administer under the Unemployment Compensation Program established pursuant to the District of Columbia Unemployment Compensation Act, approved August 28, 1935 (49 Stat. 946; D.C. Official Code § 51-101 *et seq.*). For an affected employee, there shall be no work-search requirement.

(2) An affected employee shall be eligible for UI regardless of whether the:

(A) Employer has provided a date certain for the employee's return to work; or

(B) Employee has a reasonable expectation of continued employment with the current employer.

(c) Benefits paid pursuant to this section shall not be charged to the experience rating accounts of employers.

(d) For the purposes of this section, the term "affected employee" means an employee otherwise eligible for UI pursuant to section 9 of the District of Columbia Unemployment

recipient, the date of award, intended use of the award, and the award amount. The Mayor shall publish the list online no later than June 1, 2020, or 5 days following the end of the COVID-19 emergency, whichever is earlier.

"(f) For the purposes of this section, the term "COVID-19 emergency" means the emergencies declared in the Declaration of Public Emergency (Mayor's Order 2020-045) together with the Declaration of Public Health Emergency (Mayor's Order 2020-46), declared on March 11, 2020, including any extension of those declared emergencies.".

Sec. 203. Restaurant delivery.

Section 25-113(a)(3) of the District of Columbia Official Code is amended as follows:

(a) Subparagraph (A) is amended by striking the phrase "guests; and" and inserting the phrase "guests;" in its place.

(b) Subparagraph (B) is amended by striking the phrase "guests." and inserting the phrase "guests; and" in its place.

(c) A new subparagraph (C) is added to read as follows:

"(C) A restaurant or tavern that registers with the Board may sell beer, wine, or spirts in closed containers to individuals for carry out to their home, or deliver beer, wine, or spirits in closed containers to the homes of District residents; provided, that each such carry out or delivery order be accompanied by one or more prepared food items. Board approval shall not be required for a registration under this subparagraph; however, a restaurant or tavern shall receive written authorization from ABRA prior to beginning take-out or delivery of beer, wine, or spirits pursuant to this subparagraph.".

Sec. 204. Corporate filing extension.

Section 29-102.12 of the District of Columbia Official Code is amended by adding a new subsection (e) to read as follows:

"(e) There shall be no fee for delivering the first biennial report for 2020 required by Section 29-102.11(c); provided, that the first biennial report for 2020 be delivered to the Mayor for filing by June 1, 2020.".

TITLE III. PUBLIC HEALTH, SAFETY, AND CONSUMER PROTECTION.

Sec. 301. The District of Columbia Public Emergency Act of 1980, effective March 5, 1981 (D.C. Law 3-149; D.C. Official Code § 7-2301 *et seq.*), is amended as follows:

(a) Section 5(b) (D.C. Official Code § 7-2304(b)) is amended as follows:

(1) Paragraph (2) is amended by striking the phrase "District of Columbia government;" and inserting the phrase "District of Columbia government; provided further, that a summary of each emergency procurement entered into during a period for which a public health emergency is declared shall be provided to the Council no later than 7 days after the contract is awarded. Such summary shall include a description of the goods or services procured; the source selection method; the award amount; and the name of the awardee.".

(2) Paragraph (13) is amended by striking the phrase "; or" and inserting a semicolon in its place.

(3) Paragraph (14) is amended by striking the period at the end and inserting a semicolon in its place.

(4) New paragraphs (15) and (16) are added to read as follows:

"(15) Waive application of any law administered by the Department of Insurance, Securities, and Banking if doing so is reasonably calculated to protect the health, safety, or welfare of District residents; and

"(16) Notwithstanding any provision of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 (D.C. Law 2-139, D.C. Official Code § 1-601.01 *et seq.*) ("CMPA") or the rules issued pursuant to the CMPA, the Jobs for D.C. Residents Amendment Act of 2007, effective February 6, 2008 (D.C. Law 17-108, D.C. Official Code § 1-515.01 *et seq.*), or any other personnel law or rules, the Mayor may take the following personnel actions regarding executive branch subordinate agencies that the Mayor determines necessary and appropriate to address the emergency:

"(A) Redeploying employees within or between agencies;

"(B) Modifying employees' tours of duty;

"(C) Modifying employees' places of duty;

"(D) Mandating telework;

"(E) Extending shifts and assigning additional shifts;

"(F) Providing appropriate meals to employees required to work overtime or work without meal breaks;

"(G) Assigning additional duties to employees;

"(H) Extending existing terms of employees;

"(I) Hiring new employees into the Career, Education, and Management Supervisory Services without competition;

"(J) Eliminating any annuity offsets established by any law; or

"(K) Denying leave or rescinding approval of previously approved leave.".

(b) Section 5a(d) (D.C. Official Code § 7-2304.01(d)) is amended as follows:

(1) Paragraph (3) is amended by striking the phrase "solely for the duration of the public health emergency; and" and inserting the phrase "solely for actions taken during the public health emergency;" in its place.

(2) Paragraph (4) is amended by striking the period at the end and inserting a semicolon in its place.

(3) New paragraphs (5), (6), and (7) are added to read as follows:

"(5) Waive application in the District of any law administered by the Department of Insurance, Securities and Banking if doing so is reasonably calculated to protect the health, safety, and welfare of District residents;

"(6) Authorize the use of crisis standards of care or modified means of delivery of health care services in scarce-resource situations; and

"(7) Authorize the Department of Health to coordinate health-care delivery for first aid within the limits of individual licensure in shelters or facilities as provided in plans and protocols published by the Department of Health.".

(b) Section 7 (D.C. Official Code § 7-2306) is amended by adding a new subsection (c-1) to read as follows:

"(c-1) Notwithstanding subsections (b) and (c) of this section, the Council authorizes the Mayor to extend the 15-day March 11, 2020, emergency executive order and public health emergency executive order ("emergency orders") issued in response to the coronavirus (COVID-19) for an additional 30-day period. After the additional 30-day extension authorized by this subsection, the Mayor may extend the emergency orders for additional 15-day periods pursuant to subsection (b) or (c) of this subsection.".

(c) Section 8 (D.C. Official Code § 7-2307) is amended as follows:

(1) The existing text is designated as paragraph (1).

(2) New paragraphs (2) and (3) are added to read as follows:

"(2) The Mayor may revoke, suspend, or limit the license, permit, or certificate of occupancy of a person or entity that violates an emergency executive order.

"(3) For the purposes of this section a violation of a rule, order, or other issuance issued under the authority of an emergency executive order shall constitute a violation of the emergency executive order.".

Sec. 302. The Department of Insurance and Securities Regulation Establishment Act of 1996, effective May 21, 1997 (D.C. Law 11-268; D.C. Official Code § 31-101 *et seq.),* is amended by adding a new section 5a to read as follows:

"Sec. 5a. Emergency authority of the Commissioner during a declared public health emergency.

"(a) For the duration of a public health emergency declared by the Mayor pursuant to section 5a of the District of Columbia Public Emergency Act of 1980, effective October 17, 2002 (D.C. Law 14-194; D.C. Official Code § 7-2304.01), and to address the circumstances giving rise to that emergency, the Commissioner may issue emergency rulemakings, orders, or bulletins that:

"(1) Apply to any person or entity regulated by the Commissioner; and

"(2) Address:

"(A) Submission of claims or proof of loss;

"(B) Grace periods for payment of premiums and performance of other duties by insureds;

"(C) Temporary postponement of:

"(i) Cancellations;

"(ii) Nonrenewals; or

"(iii) Premium increases;

"(D) Modifications to insurance policies;

AN ACT

D.C. ACT 24-62

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

MAY 3, 2021

To provide, on a temporary basis, for the health, safety, and welfare of District residents and support to businesses during the current public health emergency; and for other purposes.

TABLE OF CONTENTS

and make the best effort to hire at least 25% graduates from a workforce development or adult education program funded or administered by the District of Columbia.".

Sec. 507. Public health emergency authority.

The District of Columbia Public Emergency Act of 1980, effective March 5, 1981 (D.C. Law 3-149; D.C. Official Code § 7-2301 *et seq.*), is amended as follows:

(a) Section 5(b) (D.C. Official Code § 7-2304(b)) is amended as follows:

(1) Paragraph (1) is repealed.

(2) Paragraph (2) is amended by striking the phrase "District of Columbia government;" and inserting the phrase "District of Columbia government; provided further, that a summary of each emergency procurement entered into during a period for which a public health emergency is declared shall be provided to the Council no later than 7 days after the contract is awarded. The summary shall include:

(A) A description of the goods or services procured;

(B) The source selection method;

(C) The award amount; and

(D) The name of the awardee.".

(3) Paragraph (13) is amended by striking the phrase "; or" and inserting a semicolon in its place.

(4) Paragraph (14) is amended by striking the period at the end and inserting a semicolon in its place.

(5) New paragraphs (15) and (16) are added to read as follows:

"(15) Waive application of any law administered by the Department of Insurance, Securities, and Banking if doing so is reasonably calculated to protect the health, safety, or welfare of District residents; and

"(16) Notwithstanding any provision of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-601.01 *et seq.*) ("CMPA"), or the rules issued pursuant to the CMPA, the Jobs for D.C. Residents Amendment Act of 2007, effective February 6, 2008 (D.C. Law 17-108; D.C. Official Code § 1-515.01 *et seq.*), or any other personnel law or rules, the Mayor may take the following personnel actions regarding executive branch subordinate agencies that the Mayor determines necessary and appropriate to address the emergency:

"(A) Redeploying employees within or between agencies;

"(B) Modifying employees' tours of duty;

"(C) Modifying employees' places of duty;

"(D) Mandating telework;

"(E) Extending shifts and assigning additional shifts;

"(F) Providing appropriate meals to employees required to work overtime or work without meal breaks;

"(G) Assigning additional duties to employees;

"(H) Extending existing terms of employees;

"(I) Hiring new employees into the Career, Education, and Management Supervisory Services without competition;

"(J) Eliminating any annuity offsets established by any law; or

"(K) Denying leave or rescinding approval of previously approved leave.".

(b) Section 5a(d) (D.C. Official Code § 7-2304.01(d)) is amended as follows:

(1) Paragraph (3) is amended by striking the phrase "solely for the duration of the public health emergency; and" and inserting the phrase "solely for actions taken during the public health emergency;" in its place.

(2) Paragraph (4) is amended by striking the period at the end and inserting a semicolon in its place.

(3) New paragraphs (5), (6), and (7) are added to read as follows:

"(5) Waive application in the District of any law administered by the Department of Insurance, Securities, and Banking if doing so is reasonably calculated to protect the health, safety, and welfare of District residents;

"(6) Authorize the use of crisis standards of care or modified means of delivery of health care services in scarce-resource situations; and

"(7) Authorize the Department of Health to coordinate health-care delivery for first aid within the limits of individual licensure in shelters or facilities as provided in plans and protocols published by the Department of Health.".

(c) A new section 5b is added to read as follows:

"Sec. 5b. Public health emergency response grants.

"(a) Upon the Mayor's declaration of a public health emergency pursuant to section 5a, and for a period not exceeding 90 days after the end of the public health emergency, the Mayor may, notwithstanding the Grant Administration Act of 2013, effective December 24, 2013 (D.C. Law 20-61; D.C. Official Code § 1-328.11 et seq.), and in the Mayor's sole discretion, issue a grant or loan to a program, organization, business, or entity to assist the District in responding to the public health emergency, including a grant or loan for the purpose of:

"(1) Increasing awareness and participation in disease investigation and contact tracing;

"(2) Purchasing and distributing personal protective equipment;

"(3) Promoting and facilitating social distancing measures;

"(4) Providing public health awareness outreach;

"(5) Assisting residents with obtaining disease testing, contacting health care providers, and obtaining medical services;

"(6) Covering the costs of operating a business or organization including rent, utilities, or employee wages and benefits; or

"(7) Providing technical assistance to the business community.

Sec. 906. Council detailee appointment clarification.

Title 27 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-627.01 *et seq.*), is amended by adding a new section 2707 to read as follows:

"Section 2707. Definitions.

"For the purposes of this title, the term:

"(1) "Agency" includes the Council.

"(2) "Appropriate officials" includes:

"(A) For an assignment for which the Council is the receiving agency, the personnel authority to whom the employee will be assigned in consultation with the Chairman of the Council.

"(B) For an assignment for which the Council is the sending agency, the personnel authority to whom the employee is currently assigned.".

TITLE X. REPEALS; APPLICABILITY; FISCAL IMPACT STATEMENT; EFFECTIVE DATE

Sec. 1001. Repeals.

(a) The COVID-19 Response Supplemental Temporary Amendment Act of 2020, effective October 9, 2020 (D.C. Law 23-129; 67 DCR 6601), is repealed.

(b) The Coronavirus Support Temporary Amendment Act of 2020, effective October 9, 2020 (D.C. Law 23-130; 67 DCR 8622), is repealed.

(c) The Coronavirus Public Health Extension Temporary Amendment Act of 2020, enacted on January 25, 2021 (D.C. Act 23-614, 68 DCR 1484), is repealed.

Sec. 1002. Applicability.

Titles I through IX of this act shall apply as of March 12, 2021.

Sec. 1003. Fiscal impact statement.

The Council adopts the fiscal impact statement of the Budget Director as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

Sec. 1004. Effective date.

(a) This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December

24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

(b) This act shall expire after 225 days of its having taken effect.

Chairman
Council of the District of Columbia

Mayor
District of Columbia

APPROVED
May 3, 2021

ADDENDUM
Section 2 – PERB Decisions

RECEIVED
Nov 02 2020 04:18PM EST
DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD
Transaction ID: 66074006

Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Washington Teachers' Union, Local #6, American Federation of Teachers, AFL-CIO	
Petitioner	PERB Case No. 20-U-30
v.	Opinion No. 1762
District of Columbia Public Schools	
Respondent	

DECISION AND ORDER

A. Statement of the Case

On July 8, 2020, the Washington Teachers' Union, Local # 6, American Federation of Teachers, (WTU) filed an Unfair Labor Practice Complaint (Complaint) against the District of Columbia Public Schools (DCPS), alleging violations of the Comprehensive Merit Personnel Act (CMPA)[1] by DCPS' refusal to bargain health and safety protections and protocols related to WTU's bargaining unit members return to in-person learning during the COVID-19 pandemic.

A hearing was held on August 28, 2020. On October 1, 2020, the parties submitted post-hearing briefs. On October 19, 2020, the Hearing Examiner submitted a Report and Recommendations (Report). On October 20, 2020, the Board ordered preliminary relief that required the parties to bargain and additional preliminary relief. Thereafter, on October 26, 2020, the Respondent filed Exceptions to the Report. On October 28, 2020, the Complainant filed an Opposition to the Exceptions.

B. Exceptions

In its Exceptions, DCPS focused on its post-hearing conduct to argue that the record does not support the Hearing Examiner's finding of a refusal to bargain.[2] However, its post-hearing conduct, if accurately reported, does not excuse DCPS' refusal to bargain, its bargaining in bad

[1] D.C. Official Code § 1-617.04(a)(1) and (a)(5).
[2] Exceptions at 5. DCPS list 17 bargaining sessions that occurred after the hearing and mentions an October 14, 2020, tentative agreement on matters related to health and safety.

faith, or its direct dealing to undermine the WTU. Post-hearing conduct is in fact irrelevant to the findings of the Hearing Officer.

There is ample evidence in the record that DCPS asserted that it had no duty to bargain over health and safety issues and, as the Hearing Examiner found, DCPS' actions amounted to a refusal to bargain over these issues.[3]DCPS (1) refused to bargain and made unilateral changes by issuing guidelines for new working conditions without negotiation,[4] (2) engaged in direct dealing by issuing surveys to the bargaining unit regarding returning to work,[5] and (3) breached its duty to bargain by declaring mandatory health and safety proposals as non-negotiable[6] despite clear precedent from the Board.[7]

The Board has explained that the declaration of a public emergency will not excuse the bargaining obligations of the parties when there is time to negotiate.[8] Here, the Hearing Examiner found that DCPS delayed re-opening for in-person instruction on several occasions and consulted numerous sources in formulating its pandemic action plan without engaging in good faith bargaining with WTU.[9]

In its Opposition to the Exceptions, WTU argues that DCPS "failed to identify any plausible grounds for its Exceptions to the Hearing Examiner's decision."[10] WTU asserts that the record supports the Hearing Examiner's findings because DCPS failed to engage in the "give and take" of bargaining and violated its duty to negotiate in good faith.[11] WTU urges the Board to adopt the Report.[12]

The Board denies DCPS' Exceptions. The Board finds that the Hearing Examiner's Report is reasonable, supported by the record, and consistent with Board precedent.[13]

---

[3] Report at 16.
[4] Report at 16. The record is clear that DCPS implemented changes prior to substantive bargaining and impact and effects bargaining despite a clear request from WTU.
[5] DCPS concedes this point and raises no Exception to the Hearing Examiner's findings on this issue.
[6] *Teamsters, Local 639 v. DCPS*, Slip Op. No. 267 at n.9, PERB Case No. 90-U-05 (1991) (finding "that in an unfair labor practice proceeding, the negotiability of a subject and therefore the respondent's duty to bargain may well be the first question, but the final question will be whether the challenged conduct was a breach of such a duty. A negotiability appeal "pure" will not present that second question.").
[7] *AFGE Local 631 v. OLRCB*, 67 D.C. Reg. 8882, Slip Op. No. 1743 at 9, PERB Case No. 20-U-23 (2020).
[8] *FOP/ DOC Labor Comm. v. DOC*, 67 D.C. Reg. 8532, Slip Op. No. 1744 at 5, PERB Case No. 20-U-24 (2020) (citing *Port Printing & Specialties*, 351 NLRB 1269, 1270 (2007), which held that the company committed an unfair labor practice when it failed to bargain over the decision to use nonbargaining unit employees to finish work because the time for immediate decision-making had passed.).
[9] Report at 20.
[10] Opposition to Exceptions at 11.
[11] Opposition to Exceptions at 8.
[12] Opposition to Exceptions at 11.
[13] *WTU, Local 6 v. DCPS*, 65 D.C. Reg. 7474, Slip Op. No. 1668 at 6, PERB Case No. 15-U-28 (2018). *See AFGE, Local 1403 v. D.C. Office of the Attorney General*, 59 D.C. Reg. 3511, Slip Op. No. 873, PERB Case No. 05-U-32 and 05-UC-01 (2012).

C. Conclusion

The Board has considered the Hearing Examiner's Report that is attached to this Decision and Order, and the record in light of the Exceptions, Opposition to Exceptions, and briefs. The Board affirms the Hearing Examiner's rulings, findings, and conclusions, and adopts the recommended Order, as modified, and set forth below.

ORDER

IT IS HERBY ORDERED THAT:

1. The District of Columbia Public Schools shall cease and desist from interfering with, restraining, or coercing employees in their rights guaranteed to them under D.C. Official Code § 1-617.04 (a)(1) and (a)(5).

2. The District of Columbia Public Schools shall cease and desist from directly dealing with bargaining unit members in a manner that serves to undermine the Washington Teachers' Union.

3. The District of Columbia Public Schools shall cease and desist from refusing to bargain in good faith with the Washington Teachers' Union.

4. The District of Columbia Public Schools shall cease and desist from implementing changes in employment pertaining to health and safety without fulfilling its bargaining obligation with the Washington Teachers' Union.

5. The District of Columbia Public Schools shall bargain in good faith with the Washington Teachers' Union until the parties have a signed agreement or the parties reach impasse.

6. Within ten (10) days from service of this Decision and Order, the District of Columbia Public Schools shall post the attached notice conspicuously where notices to bargaining unit employees in this bargaining unit are customarily posted and electronically distribute to each bargaining unit member the notice through email or similar means in which notices are customarily distributed. Once posted, the Notice must remain posted until thirty (30) days after all bargaining unit members return to work.

7. The District of Columbia Public Schools shall notify the Board of the posting within fourteen (14) days after issuance of the Decision and Order requiring posting.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
By vote of Members Ann Hoffman, Barbara Somson, Mary Anne Gibbons, and Peter Winkler. (Chair Douglas Warshof recused.)

Washington, D.C.
October 29, 2020

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
American Federation of Government Employees Local Union No. 383, AFL-CIO, Complainant,	PERB Case No. 94-U-09 Opinion No. 418
v.	
District of Columbia Department of Human Services, Respondent.	

DECISION AND ORDER

On January 26, 1993, American Federation of Government Employees, Local 383, AFL-CIO (AFGE) filed an Unfair Labor Practice Complaint with the Public Employee Relations Board (Board). AFGE charged that the Respondent District of Columbia Department of Human Services (DHS) had violated the Comprehensive Merit Personnel Act (CMPA), D.C. Code Sec. 1-618.4(a)(1) and (5) by failing to bargain in good faith with AFGE as the exclusive representative of bargaining unit employees concerning: (1) the impact and effects of a reduction-in-force on the terms and conditions of employment of the employees that were RIF'd and those that were retained; and (2) the terms and conditions for rehiring RIF'd bargaining unit employees. [1]/ By Answer filed on February 18, 1994, the Office of Labor Relations and Collective Bargaining (OLRCB), on behalf of DHS, denied that unfair labor practices had been committed by the acts and conduct alleged.

---

[1]/ AFGE was certified as the representative of the instant unit of employees in BLR Case No. 9R010. The bargaining unit employees affected by the RIF involved employees holding the position of youth correctional officer. A total of 53 employees were RIF'd as a result of the closure of DHS's Cedar Knoll facility pursuant to measures taken to address the District's severe budgetary constraints.

The matter was heard on September 16 and 29, 1994, and the Hearing Examiner issued his Report and Recommendation on December 15, 1994 (a copy of which may be reviewed or obtained at the office of the Board). Neither party filed exceptions to the Report and Recommendation. The case is now before the Board to adopt, in whole or in part, or state reasons for rejecting the conclusions of the Hearing Examiner and issue a Decision and Order to this effect.

The Hearing Examiner made the following findings and conclusions:

By letter dated February 8, 1993, DHS notified AFGE that due to budgetary constraints and the closure of one of its facilities, there likely would be a reduction-in-force (RIF) of bargaining unit employees later in the year. (R&R at 8.) DHS "affirmed" its willingness to engage in impact and effects bargaining over the RIFs. AFGE and DHS representatives engaged in a number of meetings during the summer and fall of 1993, concerning the closure of the DHS facility and the RIFs. (R&R at 8.)

On October 27, 1993, approximately 53 bargaining unit employees, holding positions as youth correctional officers, were provided notice that they would be RIF'd effective December 3, 1993. Under District Personnel Manual (DPM) Regulations, these employees were classified as Tenure Group III. As such, they possessed no right to bump and retreat, or receive priority consideration for hire into vacant jobs, reemployment or reassignment.

During the remaining weeks prior to the December 3rd RIFs, AFGE met with DHS officials in an attempt to persuade DHS to rescind the scheduled RIFs. The Hearing Examiner found that both DHS and AFGE officials were aware that the December 3, 1993 RIF would result in a situation that would violate the minimum court mandated staffing requirements. As a result, DHS would either have to operate in violation of the court's consent decree, rescind the RIF, hire new YCOs or a combination of these options. (R&R at 9, 17 and 18.)
Nevertheless, DHS rejected all requests by AFGE to rescind the RIF and pursued alternative means for meeting projected staffing needs at certain facilities required under a consent decree.

AFGE did not request bargaining or present proposals on the impact and effect of the RIFs, either on employees that would be separated or those that would remain. It steadfastly adhered to the position that the RIFs should simply be cancelled.

During the week prior to the scheduled RIF, DHS officials concluded that it could not meet court mandated staffing requirements. DHS then decided to hire 39 temporary employees (NTE 90 days) to meet its staffing needs, including the rehiring of many of the bargaining unit employees that would be RIF'd on December 3, 1993. A further decision was made to rehire these employees on December 6, 1993, to ensure a break in service under DPM regulations. DHS did not advise AFGE nor did AFGE become aware of these decisions prior to the rehiring of these employees on December 6, 1993.

On December 3, 1993, the RIF was implemented. On December 6, 1993, DHS rehired 39 of the RIF'd YCOs as new temporary employees. The Hearing Examiner concluded that these RIF'd employees were rehired into positions that were included in the bargaining unit.

During the week after these employees were rehired as new temporaries, DHS required them, as a condition of maintaining their reemployment, to execute a memorandum of understanding (MOU) confirming their temporary employment status. Later, in January 1994, many of the rehired employees had their status converted to 13-month term appointments. All this was done without notice or bargaining with AFGE.

The Hearing Examiner concluded that AFGE did not engage in impact and effects bargaining or present any proposals before the December 3, 1993 RIF because AFGE believed "that the announced December 3, 1993 RIF could not proceed as planned" due to the understaffing that would result under the consent decree. (R&R at 9.) The Hearing Examiner found that "[AFGE] did not make any proposals after December 3, 1993, regarding the rehire of YCOs because DHS had completed its rehiring and there would have been no point in attempting to bargain after the fact on such action". (R&R at 9.) [2]/

Based on these findings, the Hearing Examiner concluded that DHS was required to engage in effects bargaining concerning the December 3, 1993 RIF, but was not obligated to bargain over the RIF decision itself. (R&R at 16.) The Hearing Examiner ruled that DHS' inability to decide until the day of the RIF that it would rehire employees had subverted AFGE's right to bargain over

---

[2]/ The Hearing Examiner made note of AFGE's assertion that it would have submitted proposals on DHS' decision to immediately rehire RIF'd employees had DHS notified AFGE of this decision in advance of the rehire. The Examiner also noted DHS' proffer that it would have bargained with AFGE over any impact and effects proposal submitted, including the rehiring of RIF'd employees.

the effects of that decision on the RIF'd employees. (R&R at 17.) He further concluded that AFGE's failure to submit a proposal after December 3, 1993, did not waive AFGE's right to engage in such effects bargaining. (R&R at 20.) Finally, the Hearing Examiner concluded that DHS committed an unfair labor practice by requiring rehired employees to execute a MOU documenting their status as temporary employees, and by later converting these employees to term employees, without bargaining with AFGE. (R&R at 21.) By these acts and conduct, the Hearing Examiner found that DHS violated D.C. Code § 1-618.4(a)(5) and (1).

Pursuant to D.C. Code § 1-605.2(3) and Board Rule 520.14, the Board has reviewed the findings, conclusions and recommendations of the Hearing Examiner and the entire record. The Board hereby adopts the Hearing Examiner's findings of fact. With respect to the conclusions of law, the Board rejects the Hearing Examiner's conclusions that DHS has violated D.C. Code § 1-618.4(a)(5) and (1) for the reasons discussed below.

The violations found by the Hearing Examiner stem from DHS' implementation of its decision to rehire RIF'd bargaining unit employees as temporary employees without first providing AFGE with notice and an opportunity to bargain. The Board has held that management's rights under D.C. Code § 1-618.8(a) do not relieve it of its obligation to bargain with the exclusive representative of its employees over the impact or effects of, and procedures concerning, the implementation of these management right decisions. IBPO, Local 446, AFL-CIO v. D.C. General Hospital, 41 DCR 2321, Slip Op. No. 312, PERB Case No. 91-U-06 (1994). The effects and impact of a non-bargainable management decision upon terms and conditions of employment, however, are bargainable only upon request. Teamsters, Local 639 v. D.C. Public Schools, 38 DCR 96, Slip Op. No. 249, PERB Case No. 89-U-17 (1991). The Board has further held that, absent a request to bargain concerning the impact and effect of the exercise of a management right, an employer does not violate D.C. Code § 1-618.4(a)(5) and (1) by unilaterally implementing a management right under D.C. Code § 1-618.8(a), without notice or bargaining. UDCFA/NEA v. UDC, ___ DCR _____, Slip Op. No. 387, PERB Case No. 93-U-22 and 93-U-23 (1994).[3]/

---

[3]/ In contrast, when management unilaterally and without notice implements a change in established and bargainable terms and conditions of employment, a request to bargain is not required to establish a failure to bargain in good faith. Under such circumstances management's duty to bargain attaches to the matter implemented or changed and management's unilateral action precludes any opportunity to make a request or bargain prior to

(continued...)

The Hearing Examiner concluded that each of DHS' actions, i.e., the RIF of bargaining unit employees and the rehiring of former employees, gave rise to an obligation to bargain.[4]/ With respect to the rehire, the Hearing Examiner further concluded that DHS did not bargain in good faith when it implemented its decision to hire RIF'd employees without providing AFGE with notice or an opportunity "to negotiate concerning not only the hire of RIF'd YCOs into these new positions, but also concerning the method for choosing which YCOs would be given first opportunity to perform the limited YCO temporary work which became available after December 3, 1993[, i.e., the date of the RIF]." (R&R at 19.)

The right to hire or rehire employees is a sole management right. D.C. Code § 1-618.8(a)(2). Management does not commit a violation of its duty to bargain in good faith by not bargaining over the exercise of that right or any impact and effects of exercising that right when no request to bargain concerning the impact and effects is made. UDCFA/ NEA v. UDC, ___ DCR _____, Slip Op. No. 387, PERB Case No. 93-U-22 and 93-U-23 (1994). This is the case notwithstanding the absence of notice or opportunity to bargain prior to exercising the management right. Id. Therefore, contrary to the Hearing Examiner's conclusion, DHS cannot be found to have violated any obligation to bargain concerning the impact and effects of rehiring RIF'd employees since he specifically found that AFGE never made a request to bargain. [5]/

---

[3](...continued)
implementation or change. AFGE, Local Union No. 3721 v. D.C. Fire Department, 39 DCR 8599, Slip Op. No. 287, PERB Case No. 90-U-11 (1992).

[4]/ Yet the Hearing Examiner concluded that "the effects of the RIF include[s], but [is] not limited to, the possibility of reemployment of the RIF'd YCOs." (R&R at 16.) Notwithstanding this conflicting conclusion, we find the record clearly supports that DHS afforded AFGE a full opportunity to bargain over the impact and effects of the RIF. AFGE was provided notice of the RIF and extended an opportunity to bargain over any impact or effect over a period of approximately 10 months, i.e., from February 8 to December 3, 1993.

[5]/ We cannot speculate, as did the Hearing Examiner, over the futility of a request by AFGE to bargain over the rehiring of these RIF'd YCOs to determine the existence of a statutory violation. Our ruling is limited to the facts of this case. We
(continued...)

We now turn to the remaining violations found by the Hearing Examiner following the rehiring of these employees as temporary employees (NTE 90 days). We have held that employees that do not have a reasonable expectation of continued employment lack the necessary interest in their terms and conditions of employment to share a community of interest with regular employees in a bargaining unit. American Federation of State, County and Municipal Employees, Council 20 and D.C. Public Schools, 31 DCR 2287, 2288, Slip Op. No. 70 at 2, PERB Case No. 83-R-08 (1984).

No finding was made by the Hearing Examiner as to these employees' prospects for long-term employment at the time these violations were found to have occurred. The Hearing Examiner merely assumed that these former bargaining unit employees once again became a part of the bargaining unit when they were rehired, an issue that DHS did not challenge. (R&R at 7.) Even assuming, however, that these employees' prospects for continued employment qualified them as members of the bargaining unit, we find that the MOU that these employees were required to sign did not effect any change in these employees' terms and conditions of employment to evoke DHS' obligation to bargain over it. The MOU was thereby a device used by management to inform employees of their new status. Therefore, we must reject the Hearing Examiner's finding of a violation by DHS' failure to bargain with AFGE over these employees' execution of an MOU that merely documented their temporary employment status. [6]/

We also find no violation by DHS' conversion of some of the new temporary employees to term employees without providing AFGE notice and an opportunity to bargain since the Examiner found that AFGE made no request to bargain. DHS' action was the exercise of a management right, i.e., "[t]o determine ... the number, types and grades of positions assigned to an

---

[5](...continued)
do not reach the issue of determining an exclusive representative's right to bargain over procedures and the impact and effect of rehiring former bargaining unit employees when those employees are separated from their employment or are subject to employment rights that are governed by law since no request to bargain was ever made.

[6]/ After the rehires, there was general confusion among these employees concerning their employment status. The Report and Recommendation is unclear as to whether or not these employees' execution of a memorandum of understanding documenting their temporary status was done pursuant to AFGE's request that DHS "clearly notify employees who had been rehired that their rehires were only to temporary appointments". (R&R at 8.)

organizational unit... ." D.C. Code § 1-618.8(a)(5). As such, any obligation to bargain extended only to any impact and effects of exercising that right, and only upon request.

ORDER

IT IS HEREBY ORDERED THAT:

The Complaint is dismissed.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

March 29, 1995

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	)	
International Brotherhood of Police Officers, Local 446, AFL-CIO,	)	
Complainant,	)	PERB Case No. 91-U-06
	)	Opinion No. 312
v.	)	
District of Columbia General Hospital,	)	
Respondent.	)	

DECISION AND ORDER

On February 12, 1991, the International Brotherhood of Police Officers, Local 446 (IBPO) filed an Unfair Labor Practice Complaint with the Public Employee Relations Board (Board) charging that the Respondent District of Columbia General Hospital (DCGH) had violated D.C. Code Sec. 1-618.4(a)(1)(2)(3) and (5) of the Comprehensive Merit Personnel Act (CMPA). IBPO alleged that DCGH unilaterally implemented a new night shift security post, thereby effecting a significant change in working conditions of bargaining unit employees and thereafter refusing to bargain with IBPO, the exclusive representative of the affected employees. On March 6, 1991, DCGH filed an Answer to the Complaint denying the commission of any unfair labor practice. By notice issued on August 15, 1991, the Board ordered a hearing which, in accordance with the notice, was held on September 17, 1991, before a duly designated hearing examiner. [1]/

The Hearing Examiner, in a Report and Recommendation (R&R) issued on December 14, 1991, found that "the implementation of the decision to add Post 12...had a significant impact on employee working conditions and that it would normally follow that the Respondent was obligated to bargain upon request over the effects of these changes." (R&R at 3 and 4.) However, he concluded that Article 5, Section F of the parties' collective

---

[1]/ At the hearing, IBPO withdrew the Complaint allegations that, by the acts and conduct noted above, DCGH violated D.C. Code Sec. 1-618.4(a)(2) and (3) of the CMPA.

bargaining agreement [2]/ constituted a "clear and unmistakable waiver" [3]/ of IBPO's "right to bargain over such changes or the effects [4]/ of such changes...." (R&R at 6.) He therefore concluded that DCGH did not violate D.C. Code Sec. 1-618.4(a)(1) and (5) "by refusing to bargain with [IBPO] over the effects that the establishment of Post 12 had upon employee working conditions." (R&R at 6-7.) [5]/

On January 15, 1992, IBPO filed exceptions to the Hearing Examiner's Report and Recommendations. [6]/ DCGH filed a Response to the Exceptions. IBPO excepted, generally, to the Hearing Examiner's finding and conclusion that there was a "clear and unmistakable waiver" of its right to bargain over the effects of DCGH's establishment of a new security post.

The Board, after reviewing the entire record and applicable authority, finds merit in IBPO's exception to the Hearing Examiner's finding and conclusion. For the reasons we address

---

[2]/ The Hearing Examiner found that although the parties' collective bargaining agreement expired by its terms on September 30, 1990, "the parties ha[d] agreed to continue to give full force and effect to this agreement after its expiration date." (R&R at 12.)

[3]/ This standard for effecting a waiver of a statutory right was embraced by the U.S. Supreme Court in Metropolitan Edison v. National Labor Relations Board, 460 U.S. 693 (1983), and has been relied upon often by this Board regarding a union's statutory right to bargain under the CMPA. See, e.g., PERB Case Nos. 89-U-17 and 90-U-28, infra.

[4]/ It was determined at hearing that IBPO sought to bargain only "the impact th[e] change would have on employee working conditions" and not "over the decision to establish Post 12." (emphasis added) (R&R at 2 and n.1.)

[5]/ An account of the relevant background of this case is contained in the Hearing Examiner's Report and Recommendation, a copy of which is attached hereto.

[6]/ In its Exceptions, IBPO requested that it be allowed "the opportunity to present the exceptions at an oral argument ...." Board Rule 520.13 allows for such requests to be made along with the reasons for the request. IBPO has neither provided, however, nor do we perceive any reason for oral argument given the record before us. Therefore, in view of the adequate opportunity we believe has been afforded the parties, we deny IBPO's request for oral argument.

below, we reject the Hearing Examiner's conclusion that there was a "clear and unmistakable waiver" of IBPO's right to bargain over the impact or effects of DCGH's establishment of Post 12.

In his Report and Recommendation, the Hearing Examiner determined that Article 3, Section A and Article 5, Section F of the parties' collective bargaining agreement met the "clear and unmistakable" standard required to waive IBPO's statutory right under the CMPA to bargain over the effects or impact of DCGH's establishment of a new security post. Article 3, Section A, entitled "Management Rights" is a restatement of D.C. Code Sec. 1-618.8(a). We have consistently held (since a time predating the parties' collective bargaining agreement) that this statutory provision of the CMPA, notwithstanding its expressed statutory reservation in management of certain listed actions, relieves management only of any obligation to bargain over its decision to take the actions listed thereunder. However, we also held that Sec. 1-618.8(a) does not relieve management of its obligation to bargain with respect the impact or effect and procedures, concerning the exercise of management rights decisions. See Washington Teachers' Union, Local 6, AFL-CIO v. District of Columbia Public Schools, 38 DCR 2654, Slip Op. No. 271, PERB Case No. 90-U-28 (1991), Teamsters Local Union Nos. 639 and 730 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. District of Columbia Public Schools, 38 DCR 96, Slip Op. No. 249, PERB Case No. 89-U-17 (1990) and American Federation of State, County and Municipal Employees, Council 20, AFL-CIO v. District of Columbia General Hospital and Office of Labor Relations and Collective Bargaining, 36 DCR 7101, Slip Op. No. 227, PERB Case No. 88-U-29 (1989). Clearly, therefore, Article 3, Section A does not act as a waiver of IBPO's statutory right to bargain over the effects or impact of DCGH's decision on bargaining-unit employees, notwithstanding contractual and statutory reservations in management with respect to DCGH's decision to establish a new security post. See D.C. Code Sec. 1-618.8(a)(4) and (5). This contractual reiteration of statutory rights cannot be interpreted as providing any more or less with respect to DCGH's duty to bargain than what we have ruled is afforded under the CMPA.

We turn now to Article 5, Section F which provides:

Article 5
Labor-Management Meetings

* * * *

Section F.

The Employer agrees that it will notify and, upon request, consult with the Union as far in advance

> as is possible prior to the implementation of new (or change of existing) policies, practices, and/or regulations related to bargaining unit working conditions. The Union may submit to Management written comments prior to the prospective date of such implementation or changes. In the event of emergency situations it is understood that no such notification will be required.
>
> Such issues shall be considered appropriate for discussion at Labor-Management meetings.

In reaching his conclusion that the above contractual provision, constituted a "clear and unmistakable waiver" of IBPO's statutory right to bargain over working conditions, the Hearing Examiner made no distinction between IBPO's right to bargain over DCGH's decision to implement new or change existing bargaining-unit working conditions, i.e., the establishment of Post 12, and IBPO's right (and DCGH's obligation) to bargain over the effects or impact of that decision. [7]/ IBPO seeks bargaining only with respect to the latter. As previously noted, under the CMPA, a distinct duty to bargain exists with respect to the effects or impact of management decisions on the terms and conditions of employment of bargaining unit employees. While Article 5, Section F may be "clear and unmistakable" with respect to DCGH's obligations to notify and consult IBPO concerning management decisions to implement new or change existing working conditions, e.g., establishment of Post 12, it is silent with respect to the impact or effects of such decisions. We, therefore, cannot conclude that Article 5, Section F is a "clear and unmistakable waiver" of IBPO's right (and, concomitantly, DCGH's duty) to bargain upon request over the impact or effects of such management decisions. [8]/ Moreover, Article 5 (of which

---

[7]/ The right and attending duty to bargain over the impact or effects of a management-right decision arises from the general right to bargain over employee terms and conditions of employment under the CMPA. D.C. Code Sec. 1-618.2(b)(4). The right to bargain over such effects has long been recognized in the private sector by the National Labor Relations Act (which contains a similar statutory provision on the scope of collective bargaining, i.e., Section 8(d)). See, Transmarine Navigation Corp., 170 NLRB No. 43 (1968).

[8]/ See, e.g., National Labor Relations Board v. Challenge Cook Brothers, 843 F.2d. 230 (6th Cir. 1988), where the U.S. Court of Appeals citing the U.S. Supreme Court decision in First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), found a provision, in the parties' collective bargaining agreement, which

Section F is a part) concerns the structure and breadth of purpose of "Labor-Management Meetings". Any determination of Section F as a waiver of statutory rights under the CMPA must be made within this context. [9]/

We therefore conclude that by unilaterally establishing Post 12 without first bargaining, upon request, with IBPO over the effects or impact on bargaining unit employees' terms and conditions of employment, DCGH has refused to bargain in good faith with IBPO in violation of D.C. Code Sec. 1-618.4(a)(1) and (5). Teamsters Local Union Nos. 639 and 730 a/w Int'l. Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO v. District of Columbia Public Schools, supra. Contrary to the Hearing Examiner, our determination regarding this violation does not require Complainant to establish that a duty to bargain existed with respect to specific impact or effect proposals either contemplated or speculated. The violation consists of DCGH's unilateral action, i.e., establishment of Post 12, without bargaining, as requested by IBPO, over the impact and effects of that action and, thereafter, continuing to refuse to bargain. Id.

ORDER

1. The District of Columbia General Hospital (DCGH) shall cease and desist from unilaterally establishing new security posts without providing an opportunity to bargain the impact and effect with the International Brotherhood of Police Officer, Local 446, AFL-CIO (IBPO).

2. DCGH shall cease and desist from interfering, in any like or related manner, with the rights guaranteed employees by the

---

(Footnote 8 Cont'd)
was silent with respect to the duty to bargain over the effects of management rights decisions, did not constitute a clear waiver of the employer's statutory duty with respect to effects bargaining.

[9]/ Unlike Article 3, Section A, Article 5, Section F is not limited to management rights matters as set forth under D.C. Code Sec. 1-618.8(a) of the CMPA. Rather Article 5, Section F addresses changes in "policies, practices and/or regulations related to bargaining unit working conditions" without qualification as to whether such changes are the result of reserved management right decisions. We have no occasion in this Decision and Order to rule upon the effect of Article 5, Section F on IBPO's right to bargain over decisions to implement new or change existing working conditions concerning matters that are not statutorily reserved in management.

Comprehensive Merit Personnel Act, by unilaterally implementing a new security post without notice and an opportunity to bargain with the exclusive representative, IBPO.

3. DCGH shall negotiate in good faith with IBPO, upon request, about the impact and effect on bargaining-unit employees of establishing Post 12.

4. DCGH shall henceforth cease and desist from implementing new security posts before fulfilling its obligation to bargain with IBPO, upon request, the impact and effects of establishing new security posts on bargaining-unit employees' terms and conditions of employment.

5. Representatives of DCGH and IBPO shall meet within seven (7) calendar days of the date of IBPO's request for bargaining as provided under paragraph 3 of this Order. The representatives shall meet on a daily basis (unless otherwise agreed-upon) until agreement is reached or their efforts result in impasse. Any resulting agreement between the parties or ultimate award imposed by interest arbitration concerning the impact and effects of establishing Post 12 shall, at the election of IBPO, take effect retroactively to November 16, 1990, the date Post 12 was implemented.

6. DCGH shall, within ten (10) days from the service of this Decision and Order, post the attached Notice conspicuously on all bulletin boards where notices to these bargaining unit employees are customarily posted, for thirty (30) consecutive days.

7. DCGH shall notify the Public Employee Relations Board, in writing, within fourteen (14) days from the issuance of this Decision and Order, that the Notice has been posted accordingly.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

May 27, 1992

ADDENDUM
Section 3 – Mayor's Order 2022-043

GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADMINISTRATIVE ISSUANCE SYSTEM

Mayor's Order 2022-043
March 17, 2022

SUBJECT: Extension of Public Emergency for COVID-19

ORIGINATING AGENCY: Office of the Mayor

By virtue of the authority vested in me as Mayor of the District of Columbia pursuant to section 422 of the District of Columbia Home Rule Act, approved December 24, 1973, Pub. L. 93-198, 87 Stat. 790, D.C. Official Code § 1-204.22; section 5 of the District of Columbia Public Emergency Act of 1980, effective March 5, 1981, D.C. Law 3-149, D.C. Official Code § 7-2304; section 1 of An Act To Authorize the Commissioners of the District of Columbia to make regulations to prevent and control the spread of communicable and preventable diseases, approved August 11, 1939, 53 Stat. 1408, D.C. Official Code §§ 7-131 *et seq.*; and in accordance with the Public Emergency Extension Emergency Amendment Act of 2021, effective January 6, 2022 (D.C. Act 24-276, 69 DCR 214); Mayor's Order 2022-007, dated January 6, 2022, and the Public Emergency Extension Emergency Amendment Act of 2022, effective March 16, 2022 (D.C. Act 24-346), it is hereby **ORDERED** that:

I. BACKGROUND

1. Two years after the World Health Organization declared a pandemic and the Secretary of the U.S. Department of Health and Human Services and the Mayor of the District of Columbia declared public emergencies for the 2019 novel coronavirus, more than 79.62 million Americans have been diagnosed with COVID-19 and more than 967,000 have died from the disease. Locally, transmission stands at a weekly case rate of 49.6 per 100,000 persons; and tragically, at least 1,318 District residents have lost their lives due to COVID-19.

2. The District has been in a state of public emergency since March 11, 2020, declared first through Mayor's Order 2020-045 (March 11, 2020) and extended with Council authorization, most recently through Mayor's Order 2022-007, dated January 6, 2022, which extended the public emergency through March 17, 2022. The Council recently authorized a further extension of the public emergency, through April 16, 2022.

3. Key indicators for COVID-19 viral spread and hospital capacity have been trending in the right direction since the height of the Omicron wave, and we are now in a state of low transmission as defined by the U.S. Centers for Disease Control and Prevention. Vaccines, long widely available in the District, are proving extraordinarily effective in keeping those who have received booster shots out of the hospital and preventing death.

4. However, COVID-19 around the world is still taking lives and causing entire cities and regions to shut down non-essential activities, which has an effect here, particularly on our supply chains and economy as a whole. New variants of concern could emerge in the future, and more data is showing the dangers of "long COVID" even for those who had mild infections. Not everyone can be vaccinated or boosted, notably those under five years of age, and even with vaccination, persons with compromised immune systems are still at risk. Further, a stubborn number of those who could be vaccinated are not; they pose a continuing danger to public health.

5. In most respects, the District is getting back to normal, and other authorities beyond Mayor's Orders ground the remaining measures that are in place, such as requirements for licensed health care personnel and employees at health care facilities to be vaccinated (Notice of Emergency and Proposed Rulemaking regarding Health Care Facility Required Vaccinations Regulations, 68 DCR 011146, October 22, 2021, proposed final rules deemed approved March 11, 2022, PR 24-0542, and subsequent extensions); and providing for COVID leave (COVID Vaccination Leave Temporary Amendment Act of 2021, D.C. Law 24-0061, effective February 18, 2022, 68 DCR 014074. Students will be required to be vaccinated for school (Coronavirus Immunization of School Students and Early Childhood Workers Amendment Act of 2021, D.C. Law 24-0085, effective March 2, 2022). The requirements for District of Columbia employees, contractors, grantees and interns to be vaccinated unless exempt, first promulgated by Mayor's Order, has been buttressed by issuances from the City Administrator and the District of Columbia Department of Human Resources (DCHR) under their authority and this requirement is now a term of contract and grant agreements with the District. Additionally, various consumer protections related to the pandemic remain in place through legislation and are no longer tied to Mayor's Orders.

6. However, certain federal funds and procedures are available based on whether a jurisdiction is in a declared state of emergency. And certain laws are triggered by being in a state of emergency; those laws must remain activated due to the ongoing problems with the supply chain caused in large measure due to the global pandemic and other lingering consequences of the pandemic.

7. Previous Mayor's Orders delegated further decisions about masking requirements to other officials, and the low transmission rate has prompted many previous requirements for indoor masking to be lifted. But as the SARS-CoV-2 virus still looms around the world, the City Administrator, Director of the Department of Health, and State Superintendent of Education retain the authority to reimpose any requirements previously lifted if circumstances warrant.

8. This Mayor's Order extends the public emergency through April 16, 2022.

II. EXTENSION OF PUBLIC EMERGENCY

The public emergency first declared by Mayor's Order 2020-045 (dated March 11, 2020) is hereby extended through April 16, 2022.

III. DELEGATIONS OF AUTHORITY

1. All powers relating to the public emergency and implementation of measures to protect the public and the District of Columbia from the effects of COVID-19 remain in place. Measures such as masking requirements may be turned on or off, as circumstances warrant.

2. Where measures undertaken during the emergency are important to continue for the protection of the public or continuity of government operations, the City Administrator, Director of the Department of Health, State Superintendent of Education, Chancellor of the District of Columbia Public Schools, Director of the Department of Human Resources, Director of the Department of Employment Services and other District government officials shall determine whether non-emergency authorities authorize continued measures, and if not, shall propose legislation for the Mayor's consideration to provide authority to continue such measures.

IV. CONTINUATION OF DISTRICT EMPLOYEE, CONTRACTOR, VOLUNTEER, AND GRANTEE VACCINATION REQUIREMENTS

The requirements and authorizations regarding the vaccination of District government employees, contractors, volunteers, and grantees first announced and imposed by Section VI. of Mayor's Order 2021-147, dated December 20, 2021, and Mayor's Order 2021-099, dated August 10, 2021, and authorized under sections 404(a) and 2004(e) of the District of Columbia Comprehensive Merit Personnel Act of 1978, effective March 3, 1978, D.C. Law 2-139; D.C. Official Code §§ 1-604.04(a) and 1-620.04(a) remain in full force and effect under permanent District personnel and procurement authorities. Guidance issued by the City Administrator, Director of the Department of Human Resources, and Chief Procurement Officer imposing or further explaining those requirements is binding and contractual requirements remain in effect regardless of any state of emergency.

V. CONTINUATION OF VACCINATION REQUIREMENTS FOR HEALTH CARE WORKERS AND FACILITIES

All requirements for vaccination of health care licensees and persons in health care facilities imposed by regulations issued by the Department of Health remain in place as they were authorized by non-emergency powers reposing in the Director of the Department of Health under the Health Occupations Revision Act of 1985, effective March 25, 1986, D.C. Law 6-99, D.C. Official Code § 3-1203.02(14).

VI. CONTINUATION OF VACCINATION REQUIREMENTS FOR SCHOOLS, CHILD CARE FACILITIES, AND STUDENT ATHLETES

1. The COVID-19 vaccination requirements imposed on adult employees, contractors, interns, and volunteers working in person in a public, public charter, independent, private, or parochial school in the District of Columbia, and all adult employees, contractors, interns, grantees, and volunteers working in person in a child care facility regulated by OSSE, by Mayor's Order 2021-109, dated September 20, 2021, shall continue in full force and effect.

2. The COVID-19 vaccination requirements imposed on student-athletes aged twelve (12) and up by Mayor's Order 2021-109, dated September 20, 2021, shall continue in full force and effect.

3. Students must be vaccinated against COVID-19 pursuant to the Coronavirus Immunization of School Students and Early Childhood Workers Amendment Act of 2021, D.C. Law 24-0085, effective March 2, 2022.

VII. ENFORCEMENT

All enforcement authorities previously cited in prior Mayor's Orders continue in full force and effect. Agencies also may invoke any enforcement authorities that they already have in an effort to contain the spread and mitigate the effects of COVID-19.

VIII. EFFECTIVE DATE AND DURATION

This Order shall be effective immediately and shall remain in effect through April 16, 2022, or until this Order is repealed, modified, or superseded.

MURIEL BOWSER
MAYOR

ATTEST: _____
KIMBERLY A. BASSETT
SECRETARY OF STATE OF THE DISTRICT OF COLUMBIA

REDACTION CERTIFICATE DISCLOSURE FORM

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.

/s/ Holly M. Johnson
Signature

22-CV-605
Case Number

Holly M. Johnson
Name

June 8, 2023
Date

holly.johnson@dc.gov
Email Address

CERTIFICATE OF SERVICE

I certify that on June 8, 2023, this brief was served through this Court's electronic filing system to:

Barbara B. Hutchinson

Geoffrey H. Simpson

/s/ Holly M. Johnson
HOLLY M. JOHNSON