**CASE NO. 23-CV-185**
(2022 CA 002435 P(MPA))

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS



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

V.

D.C. PUBLIC EMPLOYEE RELATIONS BOARD
APPELLEE

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

# BRIEF OF APPELLEE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD

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RULE 28(a)(2) CERTIFICATE

The undersigned, counsel of record for Appellee District of Columbia Public Employee Relations Board, certifies that the following listed parties appeared below before the Superior Court of the District of Columbia:

The petitioner below was American Federation of Government Employees, AFL-CIO (“AFGE”) Local 872. AFGE was represented by Barbara Hutchinson, Esq.

The District of Columbia Public Employee Relations Board ("PERB") was the respondent, represented by Bruce A. Fredrickson, Esq. and Geoffrey H. Simpson, Esq. of Webster & Fredrickson, PLLC.

The intervenor, the District of Columbia Water and Sewer Authority ("WASA") was represented by Tina M. Maiolo, Esq. and Stephen G. Rutigliano, Esq. of Carr Maloney, P.C.

Respectfully submitted,

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## STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the decision of the Public Employee Relations Board ("PERB") finding that the District of Columbia Water and Sewer Authority ("WASA") was not required to bargain over conditions for a return to work and the availability of leave connected to the Vaccine Requirement for District employees under the Comprehensive Merit Personnel Act ("CMPA") and COVID Emergency Response Act was clearly erroneous or not grounded in substantial evidence.

## SUMMARY OF THE ARGUMENT

The CMPA and COVID Emergency Act both provide the District with authority to take action to respond to the COVID emergency. The CMPA has long permitted the District "[t]o 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). And the Council enacted the COVID-19 Response Emergency Amendment Act of 2020 as part of its efforts to give the Mayor additional tools to deal with the COVID emergency. COVID-19 Response Emergency Amendment Act of 2020, D.C. Act 23-0247, Sec. 301(b)(4) (2020) (codified as D.C. Code § 7-2304(b)(15)-(16) ("COVID Emergency Act"). These provisions each limit the requirement that the District bargain with unions concerning its efforts to

respond to emergencies. Among its terms, the COVID Emergency Act explicitly permitted the District to impose changes to leave, tours of duty, place of duty, telework and other terms in the District's sole discretion. D.C. Code § 7-2304(b)(16)(K) (leave); other terms concern where and when to work fall under subsection (B) (tours of duty) and (C) (place of duty).

WASA is covered by the Labor Management provisions of the CMPA, which are the provisions at issue here. D.C. Code § 34-2202.15(a)(1). The COVID Emergency Response Act specifically alters the labor-management rights and relations regarding the COVID-19 public safety emergency under the CMPA's Labor Management provisions. PERB reasonably found that there was no duty for WASA (acting under the Mayor's authority) to bargain over the subjects at issue in this case.

## STATEMENT OF THE CASE

On October 15, 2021, AFGE filed a Request for Expedited Impasse Resolution (Resolution Request). (Joint Appendix ("JA") at 95-103.) The Resolution Request asserted that the Union and WASA had reached impasse in negotiations regarding "the subjects of return to the worksite during the coronavirus pandemic and coronavirus vaccination." (JA at 95.) The parties participated in an investigative conference on October 22, 2021. On November 12, 2021, the parties attended mediation. (JA at 82.)

On November 16, 2021, after an unsuccessful mediation, AFGE filed a Request for Expedited Interest Arbitration, asking the Board to order interest arbitration in this matter. (JA at 82.) WASA filed a Motion to Dismiss the Request for Expedited Impasse Resolution on December 7, 2021, contending that there was "no declared impasse as to any negotiable terms." (JA at 82-83.) The Motion further contended that AFGE was improperly attempting to negotiate paid leave while a collective bargaining agreement was already in place and not in negotiations. (JA at 73-80.) AFGE filed a Response to the Motion, arguing that it should be denied because the Agency had not previously declared the subject of COVID-19 administrative leave to be non-negotiable. (JA at 82.)

On January 13, 2022, PERB's Executive Director dismissed the case by letter order. (JA at 82-83.) The Executive Director explained that the Superior Court has held that management has "flexible, expansive, open-ended authority" to take the actions necessary to ensure an effective response to the COVID-19 emergency and determined that such management actions are not subject to bargaining, even over impact and effects. (JA at 82-83 (*citing District of Columbia Office of Labor Relations and Collective Bargaining v. District of Columbia Public Employee Relations Bd.*, Case No. 2020 CA 003086 P(MPA) (D.C. Super. Ct.

September 29, 2021).) Following this decision, the Executive Director explained, PERB subsequently issued a decision finding that the District's vaccination requirements for employees (Vaccination Requirements) are non-negotiable. In particular, D.C. Code § 1-617.08(a)(6) authorizes management to "take whatever actions may be necessary to carry out the mission of the District government in emergency situations." (JA at 83.) PERB relied on the Superior Court's holding in *OLRCB v. PERB* to support the conclusion that agencies have a management right to unilaterally effectuate the terms allegedly in impasse without a duty to bargain even impact and effects. (JA at 83.)

Upon that legal background, the Executive Director determined that WASA's "policy regarding employees' return to the worksite during the COVID-19 emergency is subject to the Agency's 'flexible, expansive, open-ended authority' to take whatever action is necessary to effectuate its mission during the ongoing COVID-19 emergency and is also non-negotiable." (JA at 83.) Further, PERB explained, the COVID-19 Response Emergency Amendment Act of 2020 explicitly permits management to deny leave or rescind previously approved leave as it deems necessary. This management right extended to the Union's proposals regarding administrative leave for employees who exhibit symptoms of COVID-19.

Therefore, pursuant to Board precedent, these subjects of bargaining are "discretionary and neither party is required to bargain in good faith to agreement or impasse."

AFGE moved for reconsideration. (JA at 84-89.) PERB denied the motion, explaining again that this Court took a broad view of management rights when it came to the District's COVID response, and that management was not required to bargain over impact and effects under that precedent. (JA at 13-16.)

AFGE then petitioned for review with the Superior Court. The Superior Court "agreed with the Board that the Act specifically alters the labor-management rights and relations during the COVID-19 pandemic for all covered entities, including WASA. . . . COVID-19 Response Emergency Amendment Act of 2020, D.C. Act 23-247, 67 D.C. Reg. 3093 (Mar. 17, 2020) (permitting the Mayor to make 'personnel actions regarding the executive branch subordinate agencies,' '[n]otwithstanding any provision of the" CMPA). Because the Act alters the labor-management rights of agencies, and the Authority is subject to the labor-management provisions of the CMPA, the labor-management provisions of the Act apply to the parties.'" (JA at 8 (cleaned up).)

The Superior Court also found that PERB's interpretation of the COVID Emergency Act, the CMPA, and prior precedent with respect to the effects of these two laws in the context of the COVID emergency gave WASA the right to implement management rights on the terms at issue without bargaining. (JA at 10-11.)

## STANDARD OF REVIEW

The District of Columbia Court of Appeals reviews an appeal of a PERB decision as if the appeal initially had been heard by this Court rather than by the Superior Court and applies the same standard of review. *FOP/Dep't of Corr. Labor Comm. v. District of Columbia Public Employee Relations Bd.*, 973 A.2d 174, 176 (D.C. 2011) (*citing Gibson v. District of Columbia Public Employee Relations Bd.*, 785 A.2d 1238, 1241 (D.C. 2001)). This 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." Super. Ct. Civil Agency Review Rule 1 (g); *see* D.C. Code § 1-617.13 (b) (2001) (PERB's factual findings "shall be conclusive if supported by substantial evidence in the record considered as a whole").

Agency Rule 1(g) of the Superior Court Rules of Civil Procedure and the CMPA set forth an exceptionally deferential standard of review for this Court to apply to PERB decisions. Applying this statutory standard, the

Court of Appeals has concluded that courts reviewing a PERB decision must affirm PERB's decision unless the decision is "rationally indefensible." *District of Columbia Metro. Police Dep't v. District of Columbia Public Employee Relations Bd.*, 144 A.3d 14, 16-17 (D.C. 2016); *see also Am. Fed'n of State v. Univ. of the District of Columbia*, 166 A.3d 967, 972 (D.C. 2017). The deference to PERB afforded by the CMPA, the Superior Court Rules of Civil Procedure, and the Court of Appeals is grounded on PERB's status as an expert agency specifically tasked with interpreting and applying the CMPA. *See Hawkins v. Hall*, 537 A.2d 571, 575 (D.C. 1988) (PERB has "special competence" to handle questions arising under the CMPA). Because PERB has the "express statutory responsibility" to decide standards of conduct complaints, it is error for a reviewing Court to disturb a PERB decision unless the PERB decision is clearly erroneous. *District of Columbia Public Employee Relations Bd. v. Washington Teachers' Union*, 556 A.2d 206, 210 (D.C. 1989) (reversing Superior Court because the Superior Court applied the wrong standard of review).

PERB exercised its specific authority to interpret the CMPA. In so doing, PERB determined that management rights provided by the CMPA, especially together with the COVID Emergency Act on existing CMPA rights and found that the COVID Relief Act allowed to implement the Vaccine

Requirement without bargaining. PERB's decision is reasonable and PERB respectfully requests it be affirmed.

## ARGUMENT

The COVID Emergency Act gave the Mayor and the District wide latitude to implement changes to the personnel rules and laws to respond to the COVID emergency that swept over the District, United States, and the world. The Act gave the Mayor the authority to take any and all of a specified list of personnel actions, including modifying tours of duty, places of duty, assigning additional duties, rescinding or denying leave, without any of the personnel rules that might otherwise require bargaining applying. AFGE sought to bargain with WASA connected to issues related to the return to work following the imposition of the Vaccine Requirement for District employees. The issues, PERB reasonably found, were non-negotiable and therefore there was no impasse based on WASA's refusal to bargain over them.

### I. The Legal Backdrop—The CMPA and COVID Emergency Act Define When Bargaining is Required

The CMPA was enacted to provide "a mechanism for addressing virtually every conceivable personnel issue among the District, its employees, and their unions." *District of Columbia v. Thompson*, 593 A.2d 621, 634 (D.C. 1991). The Council declared that it is the "purpose and

policy" of the CMPA "to assure that the District of Columbia government shall have a modern flexible system of public personnel administration" that will "[p]rovide for a positive policy of labor-management relations including collective bargaining between the District of Columbia government and its employees." D.C. Code § 1-601.02(6).

As part of the statutory scheme to promote industrial peace between the District and the unions representing its employees, the CMPA prohibits both the District and the unions from engaging in unfair labor practices. D.C. Code § 1-617.04.

The CMPA forbids the District from refusing to bargain in good faith and otherwise forbids the District from using coercive tactics. D.C. Code §§ 1-617.04(a)(1), (5). In determining the limits surrounding the obligation to bargain under the CMPA, PERB has adopted "the three-category approach articulated by the Supreme Court in *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349, 2 L. Ed. 2d 823, 78 S. Ct. 718 (1958)." *Drivers, Chauffeurs & Helpers Local Union No. 639 v. District of Columbia*, 631 A.2d 1205, 1207 (D.C. 1993). Thus, there are "mandatory subjects over which the parties must bargain; permissive subjects over which the parties may bargain; and illegal subjects over which the parties may not legally bargain." *Id.* (*quoting Borg-Warner*, 356 U.S. at 349).

The CMPA defines "management rights" (subjects over which the District is not required to bargain) as follows:

> (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.

D.C. Code 1-617.08(a). Thus, the CMPA has provides a framework wherein management had the unilateral right to take a host of actions with or without bargaining with the respective unions to further the missions of the agencies.

The D.C. Council vastly expanded the rights of the Mayor to implement unilateral changes to working conditions without bargaining in the COVID Emergency Act. Section 301 of the COVID Emergency Act amended the D.C. Public Emergency Act of 1980, and specifically D.C. Code § 7-2304(b)(16), as follows:

> 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, . . . 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.

D.C. Code § 7-2304(b)(16).

Interpreting the intersection between the COVID Emergency Response Act and the CMPA, the Superior Court found that the COVID Emergency Response Act gave the District the right to impose the enumerated changes without regard to their impact and effects. *OLRCB v. PERB*, Case No. 2020 CA 003086 P(MPA), *7-8 (D.C. Super. Ct. 2021)

Following the remand in *OLRCB*, PERB took note of the Court's broad view of management rights to respond to the COVID emergency, both in the COVID Emergency Response Act and in the management rights provision of the CMPA. If the terms over which parties were to bargain fell under any of the enumerated provisions of the COVID Emergency Act or under the CMPA's management right to "take whatever actions may be necessary to carry out the mission of the District government in emergency

situations," broadly viewed, then the District is not obligated to bargain. (JA at 14, 15.)

## II. The Proposals Were Non-Negotiable Under the COVID Emergency Act and CMPA

In this case, the disputed terms in the bargaining between AFGE and WASA centered on the terms of return to work and leave issues. The disputed subjects squarely fell within the ken of "management rights" under the CMPA as modified by the COVID Emergency Response Act: leave is specifically enumerated as within the District's sole discretion, D.C. Code § 7-2304(b)(16)(K) (leave); other terms concern where and when to work fall under subsection (B) (tours of duty) and (C) (place of duty) or otherwise are actions required to address an emergency (D.C. Code 1-617.08(a)(6)). PERB reasonably found these provisions to be non-negotiable, and therefore no impasse could be declared on these issues.

Below, WASA asserted that only provision in the negotiation was truly at the point of impasse: whether WASA ought to provide administrative leave because of COVID-19. (JA at 75-76.) That provision plainly is governed by § 7-2304(b)(16)(K) and is management right. PERB reasonably followed the Superior Court's decision in *OLRCB* wherein the Superior Court found that "the COVID-19 Emergency Act did not need to enumerate the specific actions management can take in an emergency

because, under D.C. Official Code § 1-617.08(a)(6), management already has "flexible, expansive, open-ended authority to take 'whatever actions may be necessary' to address" the COVID-19 emergency." (JA at 14 (citing *OLRCB v. PERB*, Case No. 2020 CA 003086 P(MPA).) The return-to-work procedures outlined herein, categorically, fell under the management right 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).

Walking through the disputes outlined by AFGE (beyond the leave for COVID proposal WASA states was the only true locus of impasse) confirms each is a management right spelled out by the COVID Emergency Act, the CMPA, or both. In its "Statement of Differences," AFGE outlined the disputes between the parties that it alleged were in impasse, and which underlay AFGE's request for impasse resolution. (JA at 97-103; *see also* JA at 110-25 (parties' proposals with disputed terms highlighted).)

Paragraph 3 concerns when an employee would remain in duty status, when leave is required, and when telework might be required. (JA at 97.) Section 7-2304(b)(16)(B) makes tours of duty a management right, § 7-2304(b)(16)(K) states that decisions on whether to rescind or grant leave a management right, and § 7-2304(b)(16)(D) makes issues

surrounding telework a management right. WASA is not required to bargain over these issues.

Paragraph 5 concerns where employees would work and under what circumstances. (JA at 98.) This term directly covered by § 7-2304(b)(16)(C), which gives the District the management right to assign the place of duty.

Paragraph 6 would require WASA to bargain over new policies related to COVID. (JA at 98.) The COVID Emergency Act states that the District's responses to the pandemic were *not* mandatory subjects of bargaining. WASA could not be required to agree to bargain over terms covered by the Act.

Paragraph 7 concerned notice to AFGE of a confirmed COVID case and the proposals concerned where and when employees worked. (JA at 98.) D.C. Code § 7-2304(b)(16)(B) and (C) gave WASA the right to determine the time and place of duty without bargaining.

Paragraph 10 concerned "telework and shift change." (JA at 98.) Telework issues are covered by D.C. Code § 7-2304(b)(16)(D). Shift change and duty issues are covered by § 7-2304(b)(16)(G).

Paragraphs 11, 12 and 15 involve when leave might be required or when leave may be rescinded. (JA at 99-100.) These are made management rights under § 7-2304(b)(16)(K).

Paragraph 16 involves when telework or leave is appropriate in connection with childcare issues (JA at 100) —as discussed this term involves management rights outlined above.

The last proposals, Paragraphs 17 and 18 concerned ventilation and equipment (JA at 100) implicate management rights concerning the place of work and telework.

Turning to the "Vaccine Requirement" proposals, a similar pattern emerges. The parties bargained over how the Vaccine Requirement was to be implemented, which falls under the management right 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). Each of the proposals falls under that broad category and often is encompassed by the provisions in the COVIDE Emergency Act.

Paragraph 1 concerned whether the collective bargaining agreement would remain in effect "for all matters." (JA at 101.) The specific dispute was that the Authority proposed to delete "to delete the words for all matters, including discipline." This possibly implicated management rights

or would interfere with the exercise of management rights to the extent it conflicted with the COVID Emergency Act.

Paragraph 3 would have provided notice of policies related to the vaccine and the opportunity to bargain over them. (JA at 101.) As stated above—notice and provision with the opportunity to bargain is at odds with the COVID Emergency Act.

Paragraph 4 concerned the cost of the vaccine, time to get vaccinated, and testing. (JA at 101.) This proposal implicated time of duty § 7-2304(b)(16)(B) and additional duties (testing on compensated time) § 7-2304(b)(16)(G).

Paragraph 5 concerns requirements to sanitize the workplace (JA at 101), which falls under § 7-2304(b)(16)(C). Whether and how to modify the place of duty is a management right under the COVID Emergency Act.

Paragraph 7 concerns application of medical or religious exemptions to receiving the vaccine. (JA at 102.) While there may have been other legal restraints on this issue, under the COVID Emergency Act, WASA would not have been required to bargain over allowing unvaccinated employees to return because that would implicate their tour and place of duty. D.C. Code § 7-2304(b)(16)(B) and (C).

Similarly, Paragraph 8 concerns proof of vaccination. (JA at 102.) The proof of vaccination and testing requirements implicated the conditions upon which employees would be allowed to return to work and amounted to an additional duty to test. All are management rights under D.C. Code § 7-2304(b)(16)(B), (C) and (G).

Paragraph 9 concerns discipline for vaccine violations. (JA at 102.) As with Paragraphs 7 and 8, the violations would involve WASA's right to control the tour and place of duty for returning employees, which are management rights.

Paragraph 10 is AFGE's proposal to allow employees to telework (and offer overtime) to address staff shortages rather than hire new employees. (JA at 102.) The COVID Emergency Act makes "Hiring new employees into the Career, Education, and Management Supervisory Services without competition" a management right. D.C. Code § 7-2304(b)(16)(I). WASA was not required to bargain over this proposal.

Paragraph 11 concerns employee leave approval and denial. (JA at 102.) This is a management right per § 7-2304(b)(16)(K).

Paragraph 12 concerns documentation for vaccines. (JA at 103.) This issue is subsumed by management's rights to decide tours of duty and place of duties as discussed above—it is part of the impact and effects of

management's rights to decide who can come into work by deciding the manner in which relevant records would be kept.

Each of the proposals was a management right under the COVID Emergency Act.

The CMPA and COVID Emergency Act, as interpreted by the Superior Court, provide firm legal ground for PERB's decision. AFGE cites no cases which might shake that foundation.

## III. AFGE Does Not Show Clear Error by PERB

To avoid the above conclusion, AFGE contends that the COVID Emergency Act does not apply to WASA, that WASA waived its rights to claim the terms were non-negotiable, and that WASA could not declare an impasse, thus WASA's position is somehow legally deficient. Taking these in turn, none of these arguments provide grounds to set aside PERB's decision.

### A. The COVID Emergency Act Applies to WASA.

AFGE contends that the COVID Emergency Act does not apply to WASA because the Emergency Act does not amend the CMPA and otherwise WASA is not subject to Mayoral rules due to WASA's enabling statute. (AFGE Br. at 9-10.) The statutory text belies that conclusion.

Laws applicable to District agencies generally apply to WASA: "Except as provided in §§ 34-2202.14 and 34-2202.15, the Authority shall be subject to all laws applicable to offices, agencies, departments, and instrumentalities of the District government." D.C. Code § 34–2202.02(b), The COVID Emergency Act is just such a law. By the very terms of WASA's establishment, the COVID Emergency Act applies.

Further, as AFGE seems to admit, WASA is covered by the Labor Management provisions of the CMPA, which are the provisions at issue here. D.C. Code § 34-2202.15(a)(1) (the CMPA does not apply to WASA except for Subchapters V and XVII (Labor Management)). As WASA explained below it is "an authority of the District Government." D.C. Code § 34-2202.02(a). It exists, "within the District government." *Id.* It operates "as a public enterprise." *Id.* at § 34-2201(8). Indeed, the Labor Management provisions of the CMPA state that the Mayor and her designees approve collective bargaining agreements, including that with WASA and AFGE. *See* D.C. Code § 1-617.15. By explicit application of the CMPA to WASA, and the CMPA's terms, WASA is subject to the authority of the Mayor when it comes to the labor-relation matters of the CMPA.

That WASA is subject to Mayoral authority concerning collective bargaining also brings it squarely under the COVID Emergency Act. To

reiterate its terms, the Act states, “Notwithstanding any provision of the District of Columbia Government Comprehensive Merit Personnel Act of 1978 . . . ("CMPA") or the rules issued pursuant to the CMPA, . . . 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.”

AFGE hopes to prevail by claiming that its rights under the CMPA’s Labor Management provisions were violated while asserting, in the same breath, that a statute expressly limiting application of the CMPA does not apply to WASA. There is no textual or principled reason to read these statutes and conclude that the COVID Emergency Act would not apply to WASA just like it applies to every entity bound by the CMPA (in whole or in part).

The core and self-evident purpose of the relevant section of the COVID Emergency Act was to give the Mayor flexibility in labor management to ensure an effective response to the COVID emergency. *OLRCB v. PERB*, Case No. 2020 CA 003086. The text is expansive, spreading to “any other personnel law or rules,” not just the CMPA or rules promulgated thereunder. “Any other personnel law or rules” covers any law or rules specific to WASA. The application of the COVID Emergency

Act therefore does not hinge on whether other Mayoral rules apply to WASA as AFGE seems to suggest.

Similarly, relying on *OLRCB*, AFGE asserts that the COVID Emergency Act does not really amend the CMPA, and therefore the COVID Emergency Act does not directly apply to WASA. But this is a non-sequitur. The COVID Emergency Act certainly circumscribes the application of the CMPA (and does so explicitly) but it applies to WASA because laws applicable to the District generally apply to WASA and because WASA falls under Mayoral authority with respect to collective bargaining, which is implicated here. Indeed, the COVID Emergency Act explicitly affects the application of the CMPA and "any other personnel law or rules" which plainly includes any personnel laws or rules applicable to WASA.

Nor is there any reason to believe that the Council intended to maximize Mayoral flexibility to respond to the COVID Emergency by circumscribing bargaining responsibilities for nearly all entities subject to Mayoral authority, but then to have WASA and the few independent corporate bodies continuing as normal under the CMPA. The application of the labor relations provisions of the CMPA, and the Mayoral authority applicable in the CMPA, brings it squarely under the authority of the Mayor

when it comes to collective bargaining. And that brings it under the application of the COVID Emergency Act.

The core issue in the case is to what extent is WASA required to bargain over COVID-related matters. PERB reasonably concluded that the CMPA and the COVID Emergency Act both apply to WASA when it comes to the scope of collective bargaining requirements.

### B. WASA Did Not Waive the Opportunity to Claim the Proposals Involved Management Rights.

AFGE further claims that WASA should have been forced to negotiate on the proposals at issue because WASA waived any claim to non-negotiability of the terms by bargaining over them. AFGE reaches back not only to law pre-dating the COVID emergency, but to law pre-dating amendments to the CMPA. (AFGE Br. at 14.) Specifically, AFGE contends:

> *Local 639 v. District of Columbia*, upheld PERB's opinion in *Teamsters Local 639 and 730 and D.C. Public Schools*, Case No. 90-N-01, 39 D.C. Reg. 5992, Slip Opinion No. 299 (1992), which ruled no issue of negotiability was established because management had not declared any issues non-negotiable, during negotiations. Management must establish the union was notified, under PERB rules, that a proposal was nonnegotiable, *Local 639* at 631 A.2d 1205. A party may not proceed through negotiations and impasse proceedings and declare a proposal non-negotiable, after the period for asserting negotiability has lapsed, *id.* In this case, the assertion Local 872's proposal was non-negotiable, occurred after PERB declared the parties were at impasse and after mediation had been completed.

(AFGE Br. at 14.) But that is no longer the law.

The CMPA was amended in 2005 to state, "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." D.C. Code § 1-617.08(a-1) (implemented by Law 15-334 on April 12, 2005).)) The CMPA now specifically and explicitly states no waiver of management rights simply because management may have previously bargained over an issue. *Id.*; *e.g.*, *American Federation of Government Employees, AFL-CIO, Local 631 Police Department Labor Committee v. District of Columbia Water and Sewer Authority*, PERB Case No. 08-U-48; Slip Opinion No. 1008, 2009 DC PERB LEXIS 13 (Dec. 31, 2009). AFGE makes no mention of § 1-617.08(a-1) nor does it make any argument as to why it does not control here. PERB reasonably held WASA did not waive any argument to retain its management rights.

Nor did WASA have any obligation to bargain to agreement or impasse on subjects of management rights. PERB held, "these subjects of bargaining are 'discretionary and neither party is required to bargain in good faith to agreement or impasse.'" (R. at 83.) If the subjects of the impasse motion were non-negotiable, and WASA conduct did not waive the

management rights (and under a-1, could not waive management rights), then PERB could not then require WASA to bargain on those subjects.

AFGE waves at an argument that PERB's consideration of the negotiability of was procedurally deficient because WASA had not provided a written statement of negotiability be provided during negotiations. (AFGE Br. at 13.) When an impasse is declared, and the District claims a term is non-negotiable during PERB impasse proceedings, PERB may order the term be withdrawn or else require that the union file a negotiability appeal. Here, with the negotiability issue squarely in dispute, PERB simply made a determination on the negotiability. In resolving the impasse issue, found that no impasse could exist because WASA was not required to bargain to impasse or agreement.

In other words, WASA made a written statement of non-negotiability during the impasse proceedings, and AFGE could then have filed a negotiability appeal parallel to the impasse proceedings. PERB's interpretation of its authority to determine issues of negotiability—squarely placed before it--was reasonable, consistent with statutory authority, and not plainly erroneous. (JA at 9 (citing *FOP/Dep't of Corr. Labor Comm.*, *supra*, 973 A.2d at 176).)

### C. The Public Emergency and COVID Emergency Act Continued in Effect Through April 2022.

PERB answered the question, "if there is a Vaccine Requirement, what is the scope of bargaining required under the CMPA and COVID Emergency Act"? Answering this question, PERB held that the terms related to return to work from COVID and the impact and effects of the Vaccine Requirement were management rights which did not require bargaining. PERB was not faced with the fundamental question of whether the Vaccine Requirement was implemented with sufficient authority under the law.

Perhaps hoping to claim that the Vaccine Requirement was itself invalid, AFGE devotes substantial space contending that the Superior Court erred in finding waiver. Yet, the Superior Court found that AFGE never raised an argument to PERB that the District did not have the authority to implement the Vaccine Requirement.

Before the Superior Court, AFGE injected the argument that the Vaccine Requirement was unlawful in the first place into the case. In its argument, AFGE relied extensively on Judge Ross's opinion invalidating the Vaccine Mandate. (JA at 22-24 (citing *Fraternal Order of Police/Metro. Police Dep't Labor Comm. v. District of Columbia*, Case No. 2022 CA 000584 B (D.C. Super. 2022)).) That argument, and any related

argument, had never been made to PERB as the Superior Court correctly found.

The Superior Court found instead that AFGE had raised issues related to the Vaccine Requirement in the return to work and its implementation. (JA at 8-9.) The Superior Court looked to AFGE's Request for Expedited Impasse Resolution (JA at 101-03) to see what it was AFGE was contesting. (JA at 9.) What the Superior Court found was that AFGE nowhere said that imposition of a Vaccine Requirement was illegal. (JA at 9 (citing the Union's Request for Impasse Resolution).)

AFGE claims refers to its motion for reconsideration as proof it challenged the Vaccine Requirement. But this is not the case. AFGE had designated certain proposals to "Vaccine Requirement Proposals" in its request for impasse resolution to PERB. (JA at 101-03; 110-26 (highlighting disputed terms).) But the proposals were not about the impositions of a Vaccine Requirement in the first place, but about how issues related to a Vaccine Requirement, presuming one would be implemented. In other words, AFGE did not assert to PERB that there was a dispute over the legality of the Vaccine Requirement *qua* Vaccine Requirement. And nowhere before PERB did AFGE make any argument parallel to those later used by Judge Ross to invalidate the Vaccine

Requirement writ large. The issue of the overall legality of the Vaccine Requirement as raised by AFGE before the Superior Court simply were not before PERB. The Superior Court correctly determined *that issue* was waived.

AFGE made a more limited claims that the Vaccine Requirement (and seemingly referring to its request for impasse resolution which categorized issues tangential to the Vaccine Requirement as falling under than umbrella) was not a management right because there was not a statutory emergency applicable to WASA and (2) WASA waived its management right by bargaining over issues related to the Vaccine Requirement. (JA at 85-89.)

Relatedly, AFGE also protests that the Superior Court did not address its argument that the COVID Emergency Act or the statutory emergency had expired, a close review reveals that the Court did rule on this issue. (JA at 8-9, n.2.) The Superior Court found that the COVID Emergency Act remained in effect and expired in February 2022. (JA 8-9, n 2.) The Court observed that the COVID Emergency Act expired on February 4, 2022, and that PERB's Executive Director's decision was issued on January 13, 2022, so the Act was still in effect during the parties' bargaining, and as such, applies to the parties' dispute.

Indeed, PERB also held that the COVID emergency remained in effect:

> The Union argues that any management rights WASA may have had related to COVID-19 are no longer in effect because, "[o]n July 24, 2021, the Mayor issued Executive Order 2021-096 ending the public health emergency, on July 25, 2021." However, pursuant to Mayor's Order 2022-043, the public emergency remains in effect through April 16, 2022.

(JA at 14.) That Order states, "All powers relating to the public emergency and implementation measures to protect the public and the District of Columbia from the effects of COVID-19 remain in place."

AFGE has no evident response to the fact that the COVID Emergency Act and public emergency both expired after the Executive Director's decision. PERB reasonably interpreted the effect of both considerations with regard to WASA's management rights.

### D. The Court Cannot Order any Practical Relief.

At bottom, AFGE seeks to require WASA to bargain over the return to work and issues over the now-defunct Vaccine Requirement. The Vaccine Requirement, the COVID Emergency Act, and the public emergency have all expired. The legal context of any future bargaining would be wildly different than in the fall of 2021 when the underlying proposals were exchanged. The case is either moot, or else PERB should have the opportunity to consider the case with the changed legal landscape.

"A case is moot when the legal issues presented are no longer 'live' or when the parties lack a legally cognizable interest in the outcome." *Cropp v. Williams*, 841 A.2d 328, 330 (D.C. 2004). Mootness "includes when the court is asked to decide only abstract or academic issues." *Classic Cab v. D.C. Dep't of For-Hire Vehicles*, 244 A.3d 703, 704 (D.C. 2021). Additionally, it is the burden of the individual asserting mootness to prove the case is moot. *Id.* "[Plaintiff's] desire for vindication is likewise inadequate to show that his appeal is not moot. The 'legal interest' at stake 'must be more than simply the satisfaction of a declaration that a person was wrong.'" *Settlemire v. D.C. Office of Emple. Appeals*, 898 A.2d 902, 907 (D.C. 2006) (*citing Lankford v. City of Hobart*, 73 F.3d 283, 288 (10th Cir. 1996)). "It is well-settled that, while an appeal is pending, an event that renders relief impossible or unnecessary also renders that appeal moot." *Settlemire, supra*, 898 A.2d at 905 (internal quotations removed). "Moreover, there 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). If the Court finds that the case is moot, it can still decide the case based on several factors: whether the issues were moot when "the trial court considered them"; whether "the parties and the court invested considerable effort in their resolution"; whether the issue or case is of

"broad importance"; and whether it should be decided on the merits. *Atchison v. District of Columbia*, 585 A.2d 150, 154 (D.C. 1991).

Given the changes to the law and underlying facts, it is difficult to see how there would be any future bargaining over the terms at issue here. There is no Vaccine Requirement (COVID-19 Vaccination Requirements (September 2022 Update), I-2022-13, available athttps://edpm.dc.gov/issuances/covid-19-vaccination-requirements/) so there would be no reason for AFGE and WASA to bargain over its implementation. Employees have returned to work and the same public health emergency measures are no longer in place, so any terms related to that public emergency are no longer at issue.

The expiration of the COVID Emergency Act and Vaccine Requirement means any future bargaining will not be pursued under the same legal regime, and what may have been a management right is 2021 might be a mandatory subject of bargaining now or in the future. The issues in this case are therefore moot.

Other factors do not auger in favor of deciding these issues despite their mootness. While the trial court did consider whether these issues were management rights, the parties and the court invested only moderate effort in their resolution. The issue was decided on briefs without extensive

fact finding and no discovery. And while vaccination requirements and return to work issues are undoubtedly important issues, those considerations are not at stake here. This case is about the precise interplay and extent of the defunct COVID Emergency Response Act and the CMPA. Whether the terms at issue were a management right is now an academic exercise because should a new pandemic or other emergency strike, the legislative response would not be the same, and a determination over bargaining rights would have to be determined anew. Should the Court decide otherwise, PERB should be permitted to determine the effect of the change of laws in the first instance as the expert agency.

## CONCLUSION

PERB's decision below is supported by substantial evidence in the record and is not clearly erroneous as a matter of law. Accordingly, PERB respectfully requests its decision be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on December 1, 2023, Appellee's Brief was served through this Court's electronic filing system to:

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# District of Columbia
# Court of Appeals

## REDACTION CERTIFICATE DISCLOSURE FORM

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

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

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Geoffrey H. Simpson
Signature

23-cv-185
Case Number(s)

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