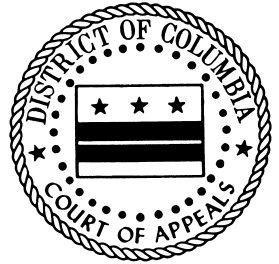


CASE NO. 22-CV-605  
(2022 CA 000282 P(MPA))



**DISTRICT OF COLUMBIA  
COURT OF APPEALS**

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

**V.**

**D.C. PUBLIC EMPLOYEE RELATIONS BOARD, ET. AL  
APPELLEES**

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**APPEAL FROM THE JULY 13, 2022 FINAL ORDER OF  
JUDGE HIRAM LUIG-PUGO  
AFFIRMING PERB OPINION NO. 1804**

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**"CORRECTED" BRIEF OF APPELLANT**

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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/ Barbara B Hutchinson  
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22-CV-605  
Case Number(s)

Dec. 7, 2022  
Date

### **List of the Parties**

The parties, in the court below, and in this court are the American Federation of Government Employees, AFL-CIO, appellant and petitioner below; D.C. Public Employee Relations Board, appellee and respondent below; and the District of Columbia Office of Labor Relations and Collective Bargaining, appellee and respondent below.

## TABLE OF CONTENTS

Table of Contents. . . . .	ii
Table of Cases, Statutes, and Authorities. . . . .	iii
Glossary. . . . .	v
Statement of Jurisdiction. . . . .	1
Statement of Issues . . . . .	1
Statement of the Case. . . . .	1
Statement of Facts. . . . .	2
Summary of the Argument. . . . .	5
Standard of Review. . . . .	5
Argument. . . . .	6
1. An Emergency Order Cannot Authorize Vaccination. . . . .	6
2. The Plain Meaning Of A Statute Controls Its Interpretation. . . . .	9
Conclusion. . . . .	13
CERTIFICATE OF SERVICE. . . . .	14

## TABLE OF CASES, STATUTES AND AUTHORITIES

<i>American Federation of Government Employees, National Office v. D.C. Public Employee Relations Board</i> , 237 A.2d 81, D.C.2020) . . . . .	6
* <i>D.C. Office of Labor Relations and Collective Bargaining v. D.C. Public Employee Relations Board, No. 003086 P(MPA)</i> (D.C. Super Ct. September 29, 2021). . . . .	4, 10, 11
* <i>District of Columbia v. Gallagher</i> , 734 A.2d. 1087 (DC 1999). . . . .	11
* <i>District of Columbia v. Washington Home Ownership Council</i> , 415 A.2d. 1349 (D.C. 1980). . . . .	6
* <i>Doctors Council of D.C. General Hospital v. D.C. Public Employee Relations Board</i> , 914 A.2d. 682 (D.C. 2007). . . . .	5, 6
* <i>Expedia, Inc. v. District of Columbia</i> , 120 A.3d. 623 (D.C. 2015). . . . .	11
* <i>Fraternal Order of Police Dep't of Corrections Labor Committee v. D.C. Public Employee Relations Board</i> , 973 A.2d. 174 (D.C. 2009). . . . .	5
* <i>Fraternal Order of Police Metropolitan Police Dept. Labor Committee v. District of Columbia</i> , NO. 000584 (D.C. Super. Ct. August 25, 2022). . . . .	8
* <i>National Federation of Independent Businesses, et. al. v. Dept. of Labor Occupational Safety and Health Admin</i> , 585 U.S. ___, 142 S.Ct. 661(2022). . . . .	7

## STATUTES, REGULATIONS, AND AUTHORITIES

COVID-19 Emergency Response Amendment Act of 2020. . . . .	<i>passim</i>
D.C. Code §§ 1-204.12 and 204.22. . . . .	6

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

D.C. Code § 1-617.08(a)(4)and (5)(D). . . . .	3, 12
D.C. Code § 1-617.08(a)(6). . . . .	<i>passim</i>
D.C. Public Emergency Act of 1980, D.C. Code § 2301, et. seq. . . . .	6, 8
D.C. Code §§ 7-2304, 7-2304(b), 7-2306. . . . .	.6, 7, 8
D.C. Code § 7-2304(b)(16). . . . .	<i>passim</i>

### **Other Authorities**

<i>American Federation of Government Employees, AFL-CIO, Local 631 v. D.C. Office of Labor Relations and Collective Bargaining, et. al. PERB Case No. 22-N-02, Opinion 1804. . . . .</i>	<i>passim</i>
Mayor's Order 2021-096. . . . .	3

## GLOSSARY

Local 631. . . . .	American Federation of Government Employees, AFL-CIO Local 631
COVID-19 Response Emergency Act. .	COVID-19 Response Emergency Amendment Act of 2020
CMPA. . . . .	Comprehensive Merit Personnel Act
District. . . . .	District of Columbia
OLRCB. . . . .	Office of Labor Relations and Collective Bargaining
PERB. . . . .	D.C. Public Employee Relations Board



## **Statement of Jurisdiction**

This is an appeal from a July 13, 2022, final order denying the appeal of *American Federation of Government Employees, AFL-CIO Local 631 v. D.C. Office of Labor Relations and Collective Bargaining, et. al*, PERB Case No. 22-N-02, *Opinion* 1804 (Dec. 21, 2021), of the D.C. Public Employee Relations Board (PERB), by the American Federation of Government Employees, AFL-CIO Local 631 (Local 631), J.A. 5-7. All matters before the Superior Court were disposed of by the July 13, 2022, order.

## **Statement of Issues**

1. Whether the court committed an error of law by affirming the opinion of PERB, which held the District of Columbia (District) based upon Mayor's Order 2021-099 and the Comprehensive Merit Personnel Act (CMPA), D.C. Code § 1-617.08(a)(6) had the authority to unilaterally impose a vaccine mandate on employees, without bargaining with the Union.
2. Whether the COVID-19 Emergency Response Act of 2020, D.C. Code § 7-2304(b)(16) amended the management rights provision of D.C. Code § 1-617.08(a)(6) to permit unilateral action in an emergency.

## **Statement of the Case**

This is an appeal of the July 13, 2022, order of Judge Hiram Puig-Lugo

affirming PERB *Opinion* 1804, granting the District the authority to, unilaterally, impose a vaccination mandate for employees, subject to the supervision of the Mayor of the District of Columbia, based upon the COVID-19 Emergency Response Act of 2020 and D.C. Code § 1-617.08(6), without bargaining with Local 631. The July 13, 2022 order held PERB's decision to classify the vaccination, as an emergency under D.C. Code § 1-617.08(a)(6) was not unreasonable J.A. 11-2.<sup>1</sup> Judge Puig-Lugo held, based upon Mayor's Order 2021-099, the vaccination requirement was in accordance with law, *id.* On August 9, 2022 Local 631 filed a motion to reconsider the July 13, 2022, Order, J.A. 4. On August 15, 2022, Judge Puig-Lugo dismissed the motion to reconsider, ruling the court lacked jurisdiction, because of the filing of the notice of appeal, *id.*

### **Statement of Facts**

On October 18, 2021, Local 631 filed the " Union's Negotiability Appeal" with PERB, stating 12 proposals of Local 631 had been declared nonnegotiable by the District, J.A.. 13-28. Local 631's negotiability appeal was filed, based upon PERB Rule 532, which requires a party file an appeal, when a proposal is declared nonnegotiable, in writing, during negotiations, J.A. 13.

During negotiations, the District asserted the vaccination requirement, for

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<sup>1</sup> The July 13, 2022 Order held, in error, the standard of review applied was for PERB standard of conduct complaints, J.A. 11.

employees, was subject to impact and implementation bargaining, based upon management rights to determine security practices, to determine efficiency of operations, and to take necessary actions during an emergency, as set forth in D.C. Code 1-617.08 (a)( 4), (5)(D) and (6), J.A. 41-2, 44-5.

On July 24, 2021, the Mayor issued Executive Order 2021-096 ending the public health emergency, on July 25, 2021, J.A. 69-72

On November 2, 2021, the District filed a response to the negotiability appeal, stating the vaccination requirement was the exercise of management rights, subject to impact and implementation bargaining, based upon D.C. Code 1-617.08 (a)( 4), (5)(D) and (6), J.A. 43-4.

On December 21, 2021, the Board dismissed the negotiability appeal stating:

"D.C. Superior Court recently interpreted the COVID-19 Response Emergency Amendment Act of 2020, finding that the legislation "gives management the sole right to take any necessary personnel action in emergency situations," "notwithstanding" any contradictory provision of the CMPA. The court held that management has "flexible, expansive, open-ended authority" to take the actions necessary to ensure an effective response to the COVID-19 emergency. The court found that such management actions were not subject to bargaining, even over impact and effects [citations omitted].

*Opinion* 1804, J.A. 6.

PERB held, "Relying on the Superior Court's ruling in *OLRCB v. PERB*, the Board finds that the Agencies have the management right to unilaterally effectuate the Vaccination Requirements. . . .," *id.*

On July 13, 2022, Judge Puig-Lugo affirmed the PERB ruling finding *Opinion*

1804 was ". . . supported by substantial evidence under the CMPA. . .; \* \* \* PERB has exclusive jurisdiction over standards of conduct complaints; \* \* \* the health pandemic was an emergency; \* \* \* and the Board's decision was in accordance with law," *July 13, 2022, Order*, J.A. 11-2.

Local 631, in the petition for review, requested *Opinion* 1804 be reversed because the COVID-19 Emergency Amendment Act did not include a vaccination requirement, as a unilateral action the District could take; the District did not assert management had a unilateral right to impose a vaccination requirement; the decision in *D.C. Office of Labor Relations and Collective Bargaining v. D.C. Public Employee Relations Board*, No. 003086 P(MPA) ( D.C. Super. Ct. September 29, 2021) authorized unilateral action for the specific actions listed; and PERB erroneously applied the ruling in *OLRCB. v. D.C. PERB*, J.A. 86-9.

In answer to the petition for review, PERB stated the decision in *OLRCB. v. D.C. PERB* combined with D.C. Code § 1-617.08(a)(6) gave the District broad authority to take actions, during an emergency and the vaccination requirement could be mandated, without bargaining with Local 631, J.A. 94.

In response to the petition for review, the District stated the vaccination requirement was a management right under D.C. Code § 1-617.08(a)(6), subject to impact and implementation bargaining; the vaccination requirement was included in the assigning of duties, as an obligatory task, under D.C. Code § 7-2304(b)(16)(G); Mayor's Order 2021-099 was an applicable law; and the vaccination requirement was

a management right in furtherance of government efficiency and internal security practices, J.A. 110-14.

Local 631's reply brief stated the public emergency had ended on July 25, 2021; no public emergency existed on August 10, 2021; and no statutory authority existed for the Mayor to impose a vaccination mandate, J.A. 119-120.

### **Summary of the Argument**

The Mayor of the District does not have authority to require a vaccination requirement for employees, because a vaccination requirement must be enacted by a legislature. No statutory authority existed for a vaccination requirement for District employees.

A statute must be given its ordinary plain meaning. The Comprehensive Merit Personnel Act was not amended by the COVID-19 Response Emergency Act.

### **Standard of Review**

In reviewing a decision of an administrative agency, the court examines the factual findings, to determine whether the findings are supported by substantial evidence and not clearly erroneous as a matter of law, *Doctors Council of D.C. General Hospital v. D.C. Public Employee Relations Board*, 914 A.2d 682, 695 (D.C. 2007), *aff'd. Fraternal Order of Police, Dep't of Corrections Labor Committee v. D.C. Public Employee Relations Board*, 973 A.2d 174, 176 (D.C. 2009). The court will defer to the administrative agency on legal issues, unless the interpretation is unreasonable, in light of prevailing law or inconsistent with the statutes, *Doctors*

*Council*, 914 A.2d 695-6. An administrative determination showing a misconception of the relevant law or a faulty application of the law cannot be affirmed, *id.* The judiciary is the final authority for interpretation of the Comprehensive Merit Personnel Act (CMPA), *American Federation of Government Employees, National Office v. D.C. Public Employee Relations Board*, 237 A.3d. 81, 87 (D.C. 2020).

## **Argument**

### **A Vaccination Requirement Must Be Enacted By A Legislature**

The D.C. Public Emergency Act of 1980, D.C. Code § 7-2301 et. seq. governs emergency actions, in the District of Columbia government. The District of Columbia Home Rule Act, sets out the powers and duties of the Mayor and the D.C. Council, D.C. Code §§ 1-204.12 and 1-204.22. D.C. Code §1-204.12 reserves to the D.C. Council the right to enact emergency legislation, *District of Columbia v. Washington Home Ownership Council*, 415 A.2d. 1349, 1351-2 (D.C. 1980). D.C. Code § 7-2304 provides authority, to the Mayor of the District, to issue orders to regulate public emergencies and outlines the scope and actions, which may be taken by the Mayor. Subsection 7-2304(b) outlines specific actions permitted to be taken by the Mayor. Emergency executive orders, of the Mayor, expire after fifteen days, unless emergency legislation is adopted by the D.C. Council, D.C. Code § 7-2306(a) and (b).

On March 17, 2020, the D.C. Council enacted emergency legislation to address the coronavirus pandemic, the COVID-19 Response Emergency Amendment Act of

2020, declaring a public emergency in the District of Columbia. The COVID-19 Response Emergency Act amended subsection 7-2304(b), by adding a new subparagraph (16), which listed specific actions the Mayor was authorized to take, during the coronavirus public emergency, notwithstanding the requirements and rules of the CMPA. The actions listed included redeploying employees, modifying tours of duty and places of duty, mandating telework, extending and assigning shifts, providing meals or requiring employees to work without a meal break, assigning additional duties, extending terms of employees, hiring new employees, eliminating annuity offsets, and denying leave and rescinding previously approved leave.

On July 24, 2021, the Mayor declared the public health emergency would end on July 25, 2021, J.A. 69. On August 10, 2021, the Mayor issued an order requiring coronavirus vaccination, for all employees under the supervision of the Mayor, J.A. 29-34. Employees were required to be vaccinated, report their vaccination status, or required to have an exemption, *id.* Failure of an employee to comply with the vaccination requirement would result in discipline up to and including termination, *id.* After the issuance of the Mayor's Order for vaccination, no legislation was enacted by the City Council requiring a vaccination requirement, for District employees.

*National Federation of Independent Business, et. al v. Dept. of Labor Occupational Health and Safety Administration, et.al*, 595 U.S. \_\_\_, 142 S.Ct. 661, 665 (2022), rejected a nationwide coronavirus vaccination mandate for employers,

stating, COVID-19 is not an occupational hazard, but a universal hazard which the general public faces, on a day to day basis, and a vaccination cannot be undone. The Court allowed a vaccine mandate would be permissible, where a particular job or workplace presented special dangers, *id. Fraternal Order of Police, Metropolitan Police Dept. Labor Committee, et.al v. District of Columbia, et.al*, No. 000584, (D.C. Super. Ct. August 25, 2022), granted summary judgment, in favor of the Fraternal Order of Police, ruling the COVID-19 Response Emergency Act did not grant authority to the Mayor of the District of Columbia to impose a vaccination requirement; ruling the authority to take unilateral actions under D.C. Code § 7-2304(b)(16) expired on February 4, 2022; ruling no part, of the 1980 Public Emergency Act, D.C. Code §7-2304, authorized imposition of a vaccination mandate; ruling no part of the 1980 Public Emergency Act authorized the taking of unilateral actions in an emergency ; ruling only a legislative body can enact a vaccination mandate; and no statute of the District of Columbia authorized a vaccination mandate and the taking of unilateral actions during an emergency, *id.*, J.A. 139-48. On September 14-15, 2022, the District rescinded the coronavirus vaccination requirements, for employees and discontinued disciplinary actions, for failure to comply with vaccination requirements, J.A. 121-4.

The vaccination requirement issued, on August 10, 2021, was not supported by any statutory authority, at the time of issuance. The July 13, 2022, order, which held the action of PERB was taken in accordance with the law, was in error. PERB, in



*Opinion* 1804, held the COVID-19 Response Emergency Act and D.C. Code § 1-617.08(a)(6) granted the District the authority to unilaterally impose a vaccination mandate, J.A. 6. The COVID-19 Response Emergency Act did not include any authority for a vaccination requirement and the management rights provision does not permit unilateral action, by the District. The District, before PERB and in its response to the petition for review, conceded the management rights provisions required impact and implementation bargaining, J.A. 42, 110.

The July 13, 2022, order upholding *Opinion* 1804 is an error of law, because no statutory authority existed for the issuance of a vaccination requirement and the Mayor had no authority, after the expiration of the public emergency to order vaccination of District employees. Local 631 was entitled to impact and implementation bargaining for the vaccination requirement. The July 13, 2022 order should be reversed; *Opinion 1804* should be reversed and the case remanded to PERB with direction to reverse *Opinion 1804*.

### **A Statute Cannot Be Amended By Implication**

The D.C. Council enacted the COVID-19 Response Emergency Act, to address the coronavirus pandemic. In passing the legislation, the Council gave the Mayor specific enumerated powers, which could be taken for District employees under the supervision of the Mayor. D.C. Code § 7-2304(b)(16) stated:

Notwithstanding any provision of the District of Columbia

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.

The plain language of the COVID-19 Response Emergency Amendment Act does not state any intent to amend the Comprehensive Merit Personnel Act and authorizes the taking of the specific listed personnel actions. *OLRCB v. PERB*, No. 003086 held:

[T]he plain language of the statute removes the personnel actions *listed* [my emphasis] in § 7-2304(b)(16) from the scope of the CMPA and relieves petitioners of any obligation under the CMPA to bargain impact and effects of these management decisions. . . . The Court agrees with petitioners . . . because the statute whose interpretation is at issue is not the CMPA but the COVID Emergency Act. . . . [B]ecause the COVID Emergency Act unambiguously makes the CMPA inapplicable when

management takes the personnel actions specified in §7-2304(b)(16) to address an emergency. . . .

*O.L.R.C.B. v. D.C. P.E.R.B.* J.A. 128.

In interpreting the application of a statute, the court examines the plain meaning of the statutory provisions, reading the literal words, in light of the statute taken as a whole, to assure a sensible construction and not work an obvious injustice, *District of Columbia v. Gallagher*, 734 A. 2d. 1087, 1091 (D.C. 1999), *aff'd Expedia, Inc. v. District of Columbia*, 120 A.3d. 623, 630 (D.C. 2015). The language, in the COVID-19 Response Emergency Act, states the listed actions may be taken by the Mayor. It is unreasonable to expand the language to assert D.C. Code § 1-617.08(a)(6) was amended to authorize any and all actions, the Mayor takes in an emergency. The court made clear in *OLRCB, supra.*, the interpretation was limited to the COVID-19 Response Emergency Act and not the CMPA. The July 13, 2022, order upholding PERB's interpretation of the CMPA is unreasonable and an error of law. The application of the COVID-19 Response Emergency Act to D.C. Code § 1-617.08(a)(6) is not based upon any reasonable reading of the emergency legislation. PERB's expansion of the emergency authority of the management rights provision is not a sensible construction of the emergency legislation. A vaccination requirement cannot fall within any of the enumerated actions, listed in the emergency legislation. The District put forth an argument, in its response to the petition, the vaccination requirement falls within Subparagraph 7-2304(b)(16)(G), assignment of additional

duties J.A. 112. Such a reading requires a contortion of the meaning of the plain language. A vaccination requirement cannot be considered a duty of an employee's position. The Council intended the Mayor to have authority over the employee's performance of their work for the District and not the employee's personal health concerns.

The July 13, 2022, order and *Opinion* 1804 are not supported by any reasonable meaning of the COVID-19 Response Emergency Act and the CMPA. The interpretation of the CMPA to require unilateral implementation of all management rights in an emergency is unreasonable, a misconception of the law, and cannot be affirmed. The July 13, 2022, order and *Opinion* 1804 should be reversed and the case remanded to PERB with direction to reverse *Opinion* 1804.

## Conclusion

Local 631 respectfully submits the July 13, 2022, order be reversed; *Opinion* 1804 be reversed and remanded to PERB with direction to take action to issue a decision requiring the District to bargain over the impact and implementation of the management rights, in D.C. Code § 1-617.08(a).

Respectfully,

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**CERTIFICATE OF SERVICE**

The foregoing Brief of Appellant and Appellant's Appendix were served upon counsel for the D.C. Public Employee Relations Board and the D.C. Office of Labor Relations and Collective Bargaining, through the court's electronic filing system, addressed to:

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This 7<sup>th</sup> day of December 2022.

/s/Barbara B. Hutchinson  
Barbara B. Hutchinson