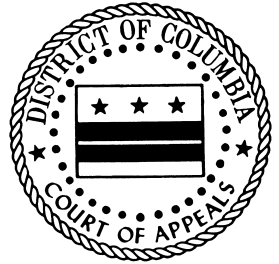


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(2022 CA 000282 P (MPA))**

**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.
APPELLEE**

**APPEAL FROM THE JULY 13, 2022 FINAL ORDER OF
JUDGE HIRAM E. PUIG-LUGO OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**

REPLY BRIEF OF APPELLANT

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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
Signature

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22-CV-605
Case Numbers

Jun 29, 2023
Date

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* Case principally relied upon are marked with an asterisk.

GLOSSARY

Local 631 American Federation of Government Employees,
AFL-CIO, Local 631

CMPA. Comprehensive Merit Personnel Act

The District. District of Columbia

PERB. Public Employee Relations Board

I. PERB Did Not Consider The Proposals In The Negotiability Appeal

PERB asserts Local 631 did not challenge the imposition of the vaccine requirement, in filing the negotiability appeal and the motion for reconsideration, *Respondent PERB's Brief* at 17-18. Local 631's Negotiability Appeal, J.A. 18, specifically raised the issue of the District not relying upon the management right for emergencies, D.C. Code § 1-617.08(a)(6), during negotiations. Local 631's negotiability appeal did raise the failure of the District to assert any management right to the specific Local 631 proposals J.A. 20, 21, 24, 25, 26, 27, and 28. PERB did not rule on Local 631's negotiability proposals, rather deciding all the proposals were non-negotiable, based upon the management right to unilaterally implement the vaccination requirement, due to the alleged emergency, *American Federation of Government Employees, AFL-CIO Local 631 and D.C. Office Of Labor Relations and Collective Bargaining, et. al*, PERB Case No. 22-N-02, Slip Op. 1804, (Dec. 21, 2021), J.A. 6. Local 631's reply in the negotiability appeal, asserted the emergency authority of the Mayor had expired, *Administrative Record* 236-8 and *American Federation of Government Employees, AFL-CIO Local 631*, J.A. 6, n. 4. PERB's assertion the legality, of the vaccination requirement was not challenged by Local 631, is not supported by the record. PERB chose not to consider the arguments raised by Local 631. PERB decided the negotiability appeal, based upon an erroneous interpretation and application of

the COVID-19 Response Emergency Amendment Act (COVID-19 Amendment) and the Comprehensive Merit Personnel Act (CMPA). The COVID-19 Amendment, specifically, limited the taking of unilateral action to those actions listed in the legislation. PERB's failure to apply the law correctly to Local's 631's negotiability appeal is an error of law and should not be upheld. Judge Puig-Lugo, incorrectly applied the law, in giving deference to PERB's erroneous interpretation and application of the law.

II. A Claim Is Moot When The Behavior Cannot Be Repeated

The District asserts Local 631 waived its right to full bargaining by not raising the issue before the Board and the case is moot because the District is no longer applying the vaccination requirement. The District's assertion is incorrect. *Thorn v. Walker*, 912 A. 2d. 1192, 1195 (D.C. 2006), held a case is moot when the parties "lack a legally cognizable interest in the outcome" [citations omitted]. To find a claim moot, a court must decide the behavior complained of, cannot reasonably be expected to recur, *Fraternal Order of Police Metropolitan Labor Committee v. District of Columbia*, 82 A.3d. 803, 813-14 (D.C. 2014).

The issue raised in this appeal and raised in Superior Court is whether PERB can apply the CMPA to permit management rights to be unilaterally implemented,

without bargaining with a union. The issue of full bargaining was before PERB during the negotiability appeal and was not ruled upon by PERB. Before the Superior Court, Local 631, specifically raised the issue of PERB's failure to decide the negotiability of each proposal, J.A. 88-9. Local 631 did not waive the issue of full bargaining and requested the court order PERB to issue a decision ordering the District to negotiate on all subjects, *id.* The District's claim, Local 631 waived the subject of full bargaining, is not supported by the record.

The District's assertion the claim is moot is not correct. The PERB decision changed the long standing PERB precedent, applying the CMPA to require bargaining with a union, prior to implementing a management right. Without a correction of this decision from PERB, the District, in an emergency, would be free to implement changes to the working conditions of union employees, without bargaining with the union. The District's abandonment of the vaccination requirement does not change the effect of the PERB decision, on the rights of unions to bargain over issues, under the CMPA. As PERB cited in its brief, PERB interpreted the emergency provision of the CMPA to permit unilateral implementation of actions in any emergency, *Respondent PERB's Brief*, at 12-15. Without the decision being reversed, Local 631 will continue to be affected by this decision, when an emergency arises, under the CMPA. The voluntary

abandonment of the vaccination requirement does not correct the ruling on unilateral implementation raised by this appeal and does not correct the erroneous interpretation and application of the CMPA. Management rights, under the CMPA, have been held to be subject to bargaining, prior to implementation of changes to working conditions, *American Federation of Government Employees, AFL-CIO Local 631, et. al v. D.C. Water and Sewer Authority*, PERB Case No. 22-U-18, Slip Op. 1837, at 6-7 (Apr. 27, 2023). Local 631 requests the court reverse the decision in this matter, which was based upon an error of law. PERB's ruling, upheld by the court, if not reversed, permits the District to unilaterally impose changes on union employees, in an emergency.

Conclusion

Local 631, based upon the foregoing and the record in this matter, respectfully requests the PERB decision in this matter be reversed and this case be remanded to PERB with instruction to reverse PERB Opinion 1804 and issue a decision, on the negotiability appeal, initially submitted by Local 631.

Respectfully,

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CERTIFICATE OF SERVICE

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

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This 29th day of June 2023.

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