

Notice: This decision may be formally revised before it is published in the District of Columbia Register. Parties should promptly notify this office of any errors so that they may be corrected before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

**Government of the District of Columbia
Public Employee Relations Board**

In the Matter of:)	
)	
American Federation of Government Employees, Local 872)	
)	
Complainant)	PERB Case No. 22-I-02
)	
and)	Opinion No. 1811
)	
District of Columbia Water and Sewer Authority)	Motion for Reconsideration
)	
Respondent)	
)	

DECISION AND ORDER

On January 25, 2022, the Complainant (Union) filed a motion for reconsideration (Motion) of an administrative dismissal (Dismissal), in which the Executive Director dismissed an impasse petition concerning negotiations of the District’s Vaccination Requirements¹ and D.C. Water and Sewer Authority’s (WASA) return to the worksite procedures. In its Motion, the Union argues that the Board should reconsider the Dismissal because WASA had a duty to bargain to impasse these management decisions and that WASA waived any management right it had to unilaterally implement the Vaccination Requirements and the return to worksite procedures.² WASA filed an opposition to the Motion.

For the reasons stated herein, the Union’s motion for reconsideration is denied.

On October 15, 2021, the Union filed a Request for Expedited Impasse Resolution (Resolution Request). The Resolution Request asserted that the Union and WASA had reached impasse in negotiations regarding “the subjects of return to the worksite [procedures] during the coronavirus pandemic and coronavirus vaccination.”³ On January 13, 2022, the Executive Director dismissed this case, finding that WASA had no duty to bargain with the Union over the

¹ Mayor’s Order I-2022-5 states, “Unless granted an accommodation for a medical or religious exemption, all current District government employees must have received an initial course of vaccination...[and] any available booster within six weeks of becoming eligible to do so.”

² Motion at 5-6.

³ Resolution Request at 1.

Agency's Vaccination Requirements, WASA's return to worksite procedures during the COVID-19 emergency, or the impact and effects of those policies.⁴

It is well settled that a mere disagreement with an Executive Director's decision is not a valid basis for the Board to grant a motion for reconsideration.⁵ Moreover, the Board will not grant a motion for reconsideration that does not assert any legal grounds that would compel overturning an Executive Director's dismissal.⁶ The Board will uphold an Executive Director's dismissal where the decision is reasonable and supported by PERB precedent.⁷

The Dismissal relied on the Board's decision in *AFGE, Local 631 and OLR CB*,⁸ in which the Board adopted the D.C. Superior Court's decision in *OLRCB v. PERB* and its application to the management rights clause of the Comprehensive Merit Personnel Act (CMPA).⁹ In its Motion, the Union argues that the Dismissal improperly relied on the Board's recent case law, because the Board incorrectly interpreted the Superior Court's decision in *OLRCB v. PERB*.¹⁰

The Board has considered and rejected similar arguments.¹¹ In *OLRCB v. PERB*, the court took a broad view of management's rights during the COVID-19 emergency and found that such management actions were not subject to bargaining, even over impact and effects.¹² The court found that the COVID-19 Response Emergency Amendment Act of 2020 (COVID-19 Emergency Act) broadly includes any management actions that may be necessary, without the need to enumerate specific actions.¹³ The court reasoned that the COVID-19 Emergency Act did not need to enumerate the specific actions management can take in an emergency because, under D.C. Official Code § 1-617.08(a)(6), management already has "flexible, expansive, open-ended authority to take 'whatever actions may be necessary' to address" the COVID-19 emergency.¹⁴ In *AFGE, Local 631 and OLR CB*, the Board found that the COVID-19 Emergency Act merely restates management's pre-existing authority under D.C. Official Code § 1-617.08(a)(6)¹⁵ and applies that authority to the specific COVID-19 emergency.¹⁶ The Board finds that the Union's

⁴ Dismissal at 2.

⁵ *Steele v. AFGE Local 383*, 61 D.C. 12373, Slip Op. No. 1492, PERB Case No. 14-U-16 (2014).

⁶ *Id.*

⁷ See e.g., *FOP/MPD Labor Comm. v. MPD*, 63 D.C. Reg. 6490, Slip Op. No. 1568, PERB Case No. 09-U-37 (2016) (upholding the Executive Director's dismissal of a complaint due to untimeliness and failure to state a claim because the dismissal was reasonable and supported by PERB precedent).

⁸ *AFGE, Local 631 and OLR CB, et al.*, Slip Op. No. 1804, PERB Case No. 22-N-02 (2021).

⁹ Case No. CA 003086 P(MPA) (D.C. Super. Ct. September 29, 2021).

¹⁰ Motion at 1-2, 4.

¹¹ *AFGE, Local 631 and OLR CB, et al.*, Slip Op. No. 1808, PERB Case No. 22-N-02 (2021); *AFGE, Local 631 v. OLR CB, et al.*, Slip Op. No. 1805, PERB Case No. 20-U-23 (2022).

¹² *OLRCB v. PERB*, Case No. 2020 CA 003086 P(MPA) (D.C. Super. Ct. September 29, 2021).

¹³ *Id.* at 6-7.

¹⁴ *Id.*

¹⁵ 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."¹⁵ However, pursuant to Mayor's Order 2022-043, the public emergency remains in effect through April 16, 2022. During the declared public emergency, D.C. Official Code § 1-617.08 (a)(6) provides WASA the management right to take whatever personnel actions it deems necessary to address the public emergency.

¹⁶ *AFGE, Local 631 and OLR CB, et al.*, Slip Op. No. 1804 at 2, PERB Case No. 22-N-02 (2022).

argument is mere disagreement with the Board's case law and is unpersuasive. The Executive Director's dismissal of the refusal-to-bargain claim concerning the Vaccination Requirements was reasonable and supported by PERB precedent. Furthermore, WASA's return to the worksite procedures, like the Vaccine Requirements, falls under the broad umbrella of "whatever actions may be necessary" to address the COVID-19 emergency and are not subject to bargaining, even over impact and effects.¹⁷

The Union also argues that "[b]argaining over a management right is a waiver of the right."¹⁸ The Union contends that WASA waived its management right to unilaterally implement the Vaccine Requirements and the return to the worksite procedures because it failed to assert that right when the parties previously bargained.¹⁹ However, D.C. Official Code § 1-617.08(a-1) states that "[a]n 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." One of the management rights listed in subsection (a) is the right to "take whatever actions may be necessary to carry out the mission of the District government in emergency situations."²⁰ Therefore, WASA's previous negotiations with the Union did not constitute a waiver of its management right to unilaterally implement the Vaccine Requirements and the return to the worksite procedures. Additionally, there is no right to impasse procedures under impact and effects bargaining.²¹ Even if the parties engaged in impact and effects bargaining over the Vaccine Requirements and the return to the worksite procedures, WASA does not have a duty to bargain to impasse.

The Union's arguments are unpersuasive. For the reasons stated, the Union's Motion for Reconsideration is denied.

¹⁷ The Union also asserts that WASA is an independent agency and not subject to the COVID-19 Emergency Act. Motion at 3-5. However, as the Union states, WASA is subject to the Board's jurisdiction under subchapter XVII of the CMPA. Motion at 3. The D.C. Water and Sewer Authority Enabling Act defines WASA as "an independent authority of the District government," but notes that WASA is "subject to the provisions of Chapter 2 of Title 1" of the D.C. Official Code, which includes subchapter XVII. The Board has previously held that subsection XVII applies to WASA. See *AFGE, Local 631 v. WASA*, 52 D.C. Reg. 5148, Slip Op. No. 778 at 14, PERB Case No. 04-U-02 (2005) (ordering WASA to cease and desist from conduct abrogating the rights granted to employees under subchapter XVII of the CMPA). Subchapter XVII includes D.C. Official Code § 1-617.08 (a)(6), which grants "[t]he respective personnel authorities (management)...the sole right...[t]o take whatever actions may be necessary to" address the COVID-19 emergency. That provision does not limit "[t]he respective personnel authorities" to the Mayor's subordinate agencies. Therefore, WASA has the management right to "take whatever actions may be necessary to" address the COVID-19 emergency.

¹⁸ Motion at 5 (citing *AFGE, Local 631 and D.C. WASA*, 54 D.C. Reg. 3210, Slip Op. 877 at 8, PERB Case No. 05-N-02, (2007)).

¹⁹ Motion at 5-6.

²⁰ D.C. Official Code § 1-617.08 (a)(6).

²¹ *AFGE, Locals 1000, 2725, 2741, 2978, 3444, and 3721 v. DHS, et al.*, 64 D.C. Reg. 4889, Slip Op. No. 1612, PERB Case No. 17-I-03 (2017).

ORDER

IT IS HEREBY ORDERED THAT:

1. The Union's Motion for Reconsideration is denied;
2. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By vote of Board Chairperson Douglas Warshof and Members Renee Bowser, Mary Anne Gibbons, and Peter Winkler.

April 28, 2022
Washington, D.C.

APPEAL RIGHTS

A final decision by the Board may be appealed to the District of Columbia Superior Court pursuant to D.C. Official Code §§ 1-605.2(12) and 1-617.13(c), which provides 30 days after a decision is issued to file an appeal.

CERTIFICATE OF SERVICE

This is to certify that the attached Opinion No. 1811 for PERB Case No. 22-I-02 was served to the following parties on this the 29th day of April 2022:

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