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

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In the Matter of:	)	
	)	
American Federation of Government	)	
Employees, Locals 631 and 872, and	)	
National Association of Government Employees,	)	
Local R3-06	)	
	)	PERB Case No. 23-U-04
Complainants	)	
	)	Opinion No. 1838
v.	)	
	)	
District of Columbia Water and Sewer Authority	)	
	)	
Respondent	)	

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**DECISION AND ORDER**

**I. Statement of the Case**

On December 20, 2022, the American Federation of Government Employees, Locals 631 and 872, and the National Association of Government Employees, Local R3-06, (Unions) filed an amended Unfair Labor Practice Complaint (Complaint) against the District of Columbia Water and Sewer Authority (WASA).<sup>1</sup> The Complaint alleges that WASA violated D.C. Code § 1-617.04(a)(1), (3), and (5) of the Comprehensive Merit Personnel Act (CMPA) by (1) unilaterally implementing paid parental leave (PPL) as a new benefit for WASA employees without providing the Unions with notice and an opportunity to bargain the change in working conditions for their members; (2) availing PPL to non-bargaining unit employees, while refusing to extend PPL to bargaining unit employees until the parties bargain over the benefit; and (3) refusing to resume bargaining with the Unions because the Unions filed a class grievance regarding WASA’s implementation of the PPL benefit. The Unions assert that WASA’s actions amount to interference with the Unions’ rights to represent employees as exclusive representatives; discrimination against the Unions and their member employees based upon their status as representatives and members; failure to bargain in good faith; and coercion.

On January 9, 2023, WASA filed an Answer denying violation of the CMPA, and further asserting affirmative defenses to the Complaint. PERB requested additional briefing from the

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<sup>1</sup> The Unions filed a Request for Preliminary Relief along with the Complaint.

parties on February 16, 2023.<sup>2</sup> The parties submitted supplemental briefs in response, clarifying their respective positions.<sup>3</sup>

For the reasons stated herein, the Board finds that WASA committed an unfair labor practice in violation of D.C. Official Code § 1-617.04(a)(1) and (5) by failing to bargain in good faith with the Unions over the PPL benefit. The Board declines jurisdiction over the allegations concerning WASA's implementation of PPL, which are pending resolution in a grievance proceeding. The Board defers the resolution of these claims to the parties' existing grievance process and partially dismisses the Complaint without prejudice.

## II. Background

The following facts are undisputed by the parties. On July 7, 2022, WASA's Board of Directors amended the Agency's Personnel Regulations to add PPL as a category of unaccrued leave for employees.<sup>4</sup> During an employee town hall meeting on September 26, 2022, WASA's CEO and General Manager announced that the PPL benefit would become available for non-bargaining unit employees, while indicating that PPL had to be negotiated for bargaining unit employees.<sup>5</sup> WASA did not provide the Unions with a written copy of its new PPL policy before it was announced at the town hall meeting.<sup>6</sup>

On October 3, 2022, WASA informed the Unions about the PPL policy and notified the Unions that the parties must negotiate the newly added benefit before bargaining unit employees avail themselves of PPL.<sup>7</sup> On October 5, 2022, WASA announced in an Agency-wide communication that it was adding PPL as a new employee benefit for non-bargaining unit employees, and that it was negotiating with the Unions to extend this benefit to bargaining unit employees.<sup>8</sup> AFGE Locals 631 and 872 requested to bargain over the PPL policy shortly thereafter.<sup>9</sup> WASA provided a copy of the Agency's PPL policy to AFGE Locals 631 and 872 and agreed to commence bargaining.<sup>10</sup> The parties held their first bargaining session on October 31, 2022.<sup>11</sup>

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<sup>2</sup> PERB directed additional briefing on the parties' positions in order to process the Unions' Request for Preliminary Relief, which is now moot.

<sup>3</sup> On March 2, 2023, the Unions filed a supplemental brief styled, "Unions' Response to February 16, 2023 Director's Letter," (Union Brief), and WASA filed a supplemental brief styled, "Respondent DC Water's Supplemental Brief," (WASA Brief).

<sup>4</sup> Complaint at 2; Answer at 2; Comp. Ex. 1.

<sup>5</sup> Answer at 5; Complaint at 3; Comp. Ex. 2.

<sup>6</sup> Answer at 5; Complaint at 3. The Unions further allege that WASA did not provide the Unions with advance notice of its intent to make PPL benefits initially available only to non-bargaining unit employees under the new PPL policy, and that the Unions found out when notice was given to all WASA employees. Complaint at 3; Comp. Ex. 2.

<sup>7</sup> Answer at 2-3; Complaint at 3; Comp. Ex. 1. Bargaining unit employees have an existing unpaid parental leave benefit under the Unions' respective CBAs. WASA Brief at 5; *see also* WASA Brief Ex. A-1, AFGE, Local 631's Working Conditions Agreement, Article 35, Section H ("Parental Leave shall be granted following the birth [or] adoption or placement of a foster child in accordance with the D.C. FMLA and Federal FMLA").

<sup>8</sup> Answer at 3; Resp. Ex. 4.

<sup>9</sup> Complaint at 3; Comp. Ex. 1; Answer at 3.

<sup>10</sup> Complaint at 4; Comp. Ex. 5; Answer at 3.

<sup>11</sup> Answer at 3; Complaint at 4; Comp. Ex. 6-8.

On November 10, 2022, AFGE Locals 631 and 872 filed a step 3 class grievance (Grievance) styled, “Failure to Provide Paid Parental Leave to Union Employees.”<sup>12</sup> The Grievance alleged that WASA violated the Unions’ respective CBAs, the Agency’s Personnel Regulations, and the CMPA by failing to provide the Unions with notice and opportunity to bargain before implementing PPL for all employees, and by refusing to extend PPL to bargaining unit employees until the Unions engaged in bargaining.<sup>13</sup> On November 23, 2022, the Unions provided WASA with a proposal and requested to resume bargaining in December 2022.<sup>14</sup>

On December 12, 2022, WASA informed the Unions that it would not resume negotiations until the Grievance was processed through completion or withdrawn.<sup>15</sup> The Unions proposed to withdraw the Grievance in exchange for WASA’s agreement to process the PPL applications of qualifying bargaining unit employees, under the same criteria applied to non-bargaining unit employees, until the parties reach an agreement on the PPL benefit.<sup>16</sup>

On December 14, 2022, WASA rejected the Unions’ proposal on PPL.<sup>17</sup> WASA also declined the Unions’ offer to settle the Grievance and reiterated its position that the Agency would not extend PPL to bargaining unit employees until the completion of bargaining.<sup>18</sup> WASA noted in the same communication that the Agency was willing to retroactively apply PPL to bargaining unit employees if the parties reach agreement on the matter.<sup>19</sup>

### III. Discussion

The Unions allege that WASA committed unfair labor practices in violation of D.C. Official Code § 1-617.04(a)(1) and (5) by engaging in the following conduct—(1) failing to give the Unions advance notice of the opportunity to bargain over the PPL benefit for bargaining unit employees; (2) implementing PPL for non-bargaining unit employees, while denying the same for bargaining unit employees until the parties bargain; and (3) refusing to bargain with the Unions because the Unions filed a Grievance regarding WASA’s implementation of PPL.<sup>20</sup> The Unions assert that WASA’s actions amount to interference with the Unions’ rights to represent employees as exclusive representatives; discrimination against the Unions and their member employees based upon their status as representatives and members; failure to bargain in good faith; and coercion.<sup>21</sup>

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<sup>12</sup> Complaint at 4; Answer at 3; Comp. Ex. 9.

<sup>13</sup> Comp. Ex. 9 at 2. The Grievance alleged violation of multiple CBA provisions, including Article 4(B)(2) of AFGE, Local 631’s CBA (“Authority shall give the President of the Union advance written notice of changes in personnel policies, practices, regulations or working conditions affecting employees covered by this Agreement. The Union shall have the opportunity to exercise their rights to bargain to the extent allowed by the CMPA.”) and Article 2 of AFGE Local 842’s CBA (“No Authority regulation on a negotiable issue is to be adopted or without the Union having the right to bargain, to the extent provided by law.”). Comp. Ex. 9, 2, 14. The Grievance also alleged violation of WASA regulation DCMR 5204.4, which added PPL as a benefit “available to all employees.” Comp. Ex. 9.

<sup>14</sup> Answer at 3; Complaint at 4; Comp. Ex. 10.

<sup>15</sup> Answer at 4; Complaint at 4-5; Resp. Ex. 6.

<sup>16</sup> Complaint at 5; Comp. Ex. 12.

<sup>17</sup> Answer at 6; Complaint at 5.

<sup>18</sup> Answer at 4; Resp. Ex. 7; Complaint at 5.

<sup>19</sup> Resp. Ex. 7.

<sup>20</sup> Complaint at 1,5; Union Brief at 1, 4-5.

<sup>21</sup> Complaint at 1,5; Union Brief at 1, 4-5.

WASA maintains that it has not committed any violations under the CMPA, other applicable law, or the parties' CBAs.<sup>22</sup> WASA argues that the Agency was not required to bargain with the Unions before offering the PPL benefit to non-bargaining unit employees.<sup>23</sup> WASA further contends that bargaining unit employees are not automatically entitled to a benefit that is undisputed by the parties as a mandatory subject of bargaining.<sup>24</sup> Finally, WASA argues that it was reasonable for the Agency not to resume bargaining until the Grievance was resolved, because the Grievance was filed over the same matter the parties were bargaining.<sup>25</sup> WASA argues that suspending bargaining would alleviate addressing the same matter in two forums, which could lead to inconsistent outcomes.<sup>26</sup>

#### **A. Board's Scope of Review over the Unions' Claims**

The record supports WASA's claim that the Unions also made the following allegations in the Grievance: (1) WASA refused to automatically avail bargaining unit employees of PPL under its new policy until the parties reach agreement on the matter; and (2) WASA did not provide the Unions with notice and a chance to bargain before availing the benefits to non-bargaining unit employees.<sup>27</sup> In the Grievance, the Unions alleged violation of their respective CBAs, the Agency's Personnel Regulations, and the CMPA.<sup>28</sup> In the present proceeding, the Unions are alleging violation of the CMPA.<sup>29</sup>

The Board distinguishes between obligations that are statutorily imposed under the CMPA and those that are contractually agreed upon between the parties.<sup>30</sup> It is well established that the Board's authority only extends to resolving statutorily based obligations under the CMPA.<sup>31</sup> The Board retains jurisdiction over allegations concerning violation of contract if the record demonstrates that such allegations also concern violation of the CMPA.<sup>32</sup> However, the Board lacks jurisdiction over allegations where the Board would be required to interpret the parties' CBA in order to determine whether there has been a violation of the CMPA.<sup>33</sup>

Investigating the CBA and Agency regulation violations alleged here requires further fact finding, which is already part of the parties' ongoing Grievance proceeding. The Board generally

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<sup>22</sup> Answer at 8.

<sup>23</sup> WASA Brief at 5.

<sup>24</sup> Answer at 2; WASA Brief at 4.

<sup>25</sup> Answer at 1, 3-4; Resp. Ex. 6; WASA Brief at 1-2.

<sup>26</sup> Answer at 1-2.

<sup>27</sup> WASA Brief at 2; Comp. Ex. 9.

<sup>28</sup> Comp. Ex. 9.

<sup>29</sup> Comp. at 1; Union Brief at 3-4.

<sup>30</sup> *AFGE, Local 2741 v. DPR*, 50 D.C. Reg. 5049, Slip Op. No. 697 at 4, PERB Case No. 00-U-22 (2002).

<sup>31</sup> *Id.*

<sup>32</sup> *See DCPS v. WTU, Local 6*, 63 D.C. Reg. 11720, Slip Op. No. 1587 at 3, PERB Case No. 14-U-20 (2016).

<sup>33</sup> *See id.*; *FOP/DOC Labor Comm. v. DOC*, 70 D.C. Reg. 3466, Slip Op. No. 1829 at 4, PERB Case No. 23-U-03 (2023); *see also FOP/MPD Labor Comm. v. MPD*, 62 D.C. Reg. 13348, Slip Op. No. 1534 at p. 7, PERB Case No. 08-U-22 (2015).

exercises its discretion to defer to contractual grievance procedures where a dispute presented on statutory grounds can be properly resolved through voluntary, contractual mechanisms.<sup>34</sup>

For these reasons, the Board defers resolution of these claims to the parties' Grievance process and partially dismisses the Complaint without prejudice. The Board's jurisdiction in this proceeding will thus be limited to the Unions' claim that WASA violated the CMPA by refusing to bargain with the Unions because the Unions filed the Grievance.

### **B. Refusal to Bargain**

The Board may render a decision upon the pleadings if a review of an unfair labor practice complaint and any responses thereto reveal that there is no issue of fact to warrant a hearing.<sup>35</sup> The parties do not dispute that the PPL benefit is subject to collective bargaining.<sup>36</sup> The record further reflects that the parties do not dispute any other material issues of fact. Therefore, it is appropriate for the Board to decide this issue upon the pleadings.

The Unions claim that WASA committed an unfair labor practice by refusing to bargain over the PPL policy unless the Unions withdrew the Grievance.<sup>37</sup> WASA does not dispute that its conduct resulted in an indefinite delay on negotiations.<sup>38</sup> WASA argues that the delay in bargaining stems from the Agency's concerns about multiple outcomes in different forums.<sup>39</sup> WASA submits that this concern is reasonable.<sup>40</sup>

WASA additionally notes that the parties had one bargaining session and were not at impasse when the Grievance was submitted.<sup>41</sup> WASA argues that the Agency repeatedly made its initial bargaining offer to the Unions, proposing that bargaining unit employees receive the same PPL benefits as non-bargaining unit employees.<sup>42</sup> WASA contends that the Unions "unilaterally delayed the implementation of the PPL benefits for themselves by their actions to date and by repeatedly rejecting [WASA]'s offer to provide PPL benefits on the same terms as [WASA]'s non-union employees."<sup>43</sup>

D.C. Official Code § 1-617.04(a)(5) makes it an unfair labor practice for the District to refuse to bargain collectively in good faith with the exclusive representative. The Board has adopted the National Labor Relations Board (NLRB) holding that "an employer violates its obligation to bargain in good faith by refusing to make any proposals on or engage in discussions over one category of mandatorily negotiable matters until negotiations occurred and agreement was reached over another category of mandatorily negotiable matters."<sup>44</sup> The Board has applied

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<sup>34</sup> *AFGE, Local 872 v. DPW*, 38 D.C. Reg. 6693, Slip Op. No. 266, PERB Case No. 89-U-15 (1991).

<sup>35</sup> Board Rule 520.6.

<sup>36</sup> Complaint at 5; Answer at 2.

<sup>37</sup> Complaint at 5.

<sup>38</sup> Answer at 8; WASA Brief at 2, 5-6.

<sup>39</sup> WASA Brief at 1-2.

<sup>40</sup> *Id.*

<sup>41</sup> WASA Brief at 2.

<sup>42</sup> WASA Brief at 3.

<sup>43</sup> WASA Brief at 3.

<sup>44</sup> *UDCEA v. UDC*, 41 D.C. Reg. 1585, Slip Op. No. 297 at 3, PERB Case No. 90-U-23 (1994) (citing *Federal Magul Corp.*, 212 NLRB No. 141 (1974)); see also *Gen. Drivers & Helpers Union, Local 662 v. NLRB*, 302 F.2d 908, 910

this holding to find violation of the statutory duty to bargain under the CMPA when an employer refused to meet for substantive bargaining over compensation issues until the parties first reached an agreement on procedural ground rules;<sup>45</sup> and when an employer refused to meet for the negotiation of a CBA until an exclusive representative agreed to conduct all negotiations, grievance meetings, and hearings virtually.<sup>46</sup>

A violation of the employer's statutory duty to bargain under D.C. Code 1-617.04(a)(5) also derivatively constitutes a violation of the counterpart duty not to interfere with, restrain or coerce employees' statutory rights under D.C. Official Code § 1-617.04(a)(1).<sup>47</sup>

In this case, the record reflects that WASA fails to offer any legal rationale for its refusal to resume bargaining with the Unions. WASA's argument about the same matter proceeding in multiple venues is unfounded. Bargaining over the benefit is a separate issue from the matters addressed in the Grievance. The Grievance alleged that WASA's prior conduct in implementing the benefit violated the parties' existing CBAs. As the Unions note, the Grievance addressed the past denial of the PPL applications of bargaining unit employees.<sup>48</sup> As such, the Grievance has no bearing on WASA's statutory duty to bargain over a future PPL benefit for bargaining unit employees. Despite WASA's assertion to the contrary, the Agency's reliance on this argument to delay bargaining indefinitely is unreasonable.

For these reasons, the Board finds that WASA's conduct, in conditioning its obligation to bargain on the Union's Grievance first being resolved, constitutes a clear-cut and flagrant violation of its duty and obligation to bargain in good faith.

#### **IV. Conclusion**

The Board finds that WASA committed an unfair labor practice in violation of D.C. Official Code § 1-617.04(a)(1) and (5).

### **ORDER**

#### **IT IS HEREBY ORDERED THAT:**

1. The D.C. Water & Sewer Authority shall cease and desist from refusing to bargain over the Paid Parental Leave policy;

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(D.C. Cir. 1962) (holding that the NLRB correctly found that the refusal of Employer to meet with the union unless and until it ended a strike was a clear refusal to bargain in violation of Section 8(a)(5) of the Act. There the Employer and the union held several negotiating sessions but did not reach an agreement. The Employer refused to negotiate further, and the union called a strike. The Employer told the union that it would talk further with the union if the strikers returned to work.)

<sup>45</sup> See *UDCFA*, Slip Op. No. 297 at 2.

<sup>46</sup> *WTU, Local 6, American Federation of Teachers v. DCPS*, 67 D.C. Reg. 10429, Slip Op. No. 1755 at 4, PERB Case No. 20-A-06 (2020).

<sup>47</sup> See *UDCFA*, Slip Op. No. 297 at 2.

<sup>48</sup> Union Brief at 2.

2. The D.C. Water & Sewer Authority shall bargain forthwith with the American Federation of Government Employees, Local 631, the American Federation of Government Employees, Local 872, and the National Association of Government Employees Local R3-06 over Paid Parental Leave benefits for bargaining unit employees;
3. The D.C. Water & Sewer Authority shall within ten (10) days of issuance of this Decision and Order post a Notice electronically and on all bulletin boards where notices to bargaining unit employees are normally posted for thirty (30) days;
4. The D.C. Water & Sewer Authority shall notify the Board of the posting within fourteen (14) days after issuance of the Decision and Order requiring posting;
5. 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 20, 2023

Washington, D.C.

**APPEAL RIGHTS**

Pursuant to Board Rule 559.2, a party may file a motion for reconsideration within fourteen (14) days, requesting the Board to reconsider its decision. Additionally, 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 provide thirty (30) days after a Board decision is issued to file an appeal.