Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
American Federation of Government Employees, Local 631, Complainant,	PERB Case No. 11-U-36
v.	Opinion No. 1425
District of Columbia Department of Public Works, Department of Public Works Office of Administrative Services, Department of Environment, Department of Real Estate Services, Department of Transportation Office of Zoning, and Office of Planning, Respondents.	

DECISION AND ORDER

I. Statement of the Case

Complainant American Federation of Government Employees, Local 631 ("Union" or "Complainant") filed the above-captioned Unfair Labor Practice Complaint ("Complaint"), against Respondents District of Columbia Department of Public Works, Department of Public Works Office of Administrative Services, Department of Environment, Department of Real Estate Services, Department of Transportation, Office of Zoning, and Office of Planning ("Agencies" or "Respondents") for alleged violations of sections 1-617.04(a)(1) and (5) of the Comprehensive Merit Protection Act ("CMPA"). Specifically, Complainant alleges that the Respondents repudiated the parties' collective bargaining agreement ("CBA") by furloughing bargaining unit members on holidays, refusing to strike for an arbitrator, and requesting the withdrawal of an arbitration panel. (Complaint at 4). Respondents filed a document styled

Answer to Unfair Labor Practice Complaint ("Answer") in which they deny the alleged violations and raise the following affirmative defenses:

> (1) The Complaint fails to state a cause of action for which relief may be granted by the Board;
> (2) The Complainant fails to allege facts sufficient to support a finding of repudiation of contract; and
> (3) The Complainant is attempting to enforce what it alleges are contractual rights. Interpreting the arbitrability of contract rights cases is not within the jurisdiction of the [Board].

(Answer at 4).

II. Discussion

A. Facts

On October 6, 2009, the parties entered into a CBA which provided for twelve holidays. (Complaint at 2; Answer at 2). Respondents state that on January 20, 2011, they sent a letter to Union President Barbara Milton which provided notice of four legislatively mandated furlough days. (Answer at 2). Respondents further state that on February 3, 2011, Ms. Milton sent a letter acknowledging receipt of the January 20, 2011, letter. *Id.* On February 4, 2011, Respondents notified bargaining unit employees of the furlough days. (Complaint at 2). The Union filed a step 4 class grievance alleging that the furlough of bargaining unit employees violated the parties' CBA, which was subsequently denied by the Respondents. (Complaint at 2-3, Complaint Ex. 4-5; Answer at 3). In its grievance, the Union alleged that the furlough days violated Article 4, Sections B and D[1], and Article 33, Section A[2] of the parties' CBA, as well as D.C. Code §§ 1-612.02(a) and (3) and 1-617.04(a)(5). (Complaint Ex. 4). In its letter denying the step 4 class grievance, the Respondents stated that "the subject matter of the grievance is substantively neither grievable nor arbitrable but must be challenged pursuant to 'applicable law' as provided for in Article 38, Sec. D" of the parties' CBA.[3] The letter further stated that the

[1] Article 4, Sections B and D state:

> B: "Authority of this Agreement
> Where any Employer regulation or policy, in effect and/or developed after the effective date of this Agreement conflicts with this Agreement and/or any supplemental agreement, this Agreement shall prevail and/or govern.
>
> D: "Bargaining
> No Employer regulation or policy that is a negotiable issue is to be adopted or changed without first bargaining with the Union.

[2] Article 33, Section A: "Holidays" lists New Year's Day, Dr. Martin Luther King, Jr.'s Birthday, President's Day, Emancipation Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day, Christmas Day, and Inauguration Day as holidays, as well as "[a]ny other day designated to be a legal holiday by the Congress or the Mayor or the U.S. President."

[3] Article 38, Section D: "General" states:

furlough was mandated by the Balanced Budget Holiday Furlough Emergency Act of 2011 and the Public Safety Civilian Emergency Personnel Furlough Exemptions Emergency Amendment Act of 2011, and asserted that the CBA language "merely lists the holidays outlined in the law," and that the "legislative history of the CMPA clearly states that holidays are non-negotiable." (Complaint Ex. 5).

On March 8, 2011, the Union invoked arbitration and requested a panel of arbitrators from the Federal Mediation and Conciliation Service ("FMCS"), pursuant to Article 38[4] of the parties' CBA. (Complaint at 3, Complaint Ex. 6; Answer at 3). On March 21, FMCS sent the parties the panel of arbitrators. (Complaint at 3, Complaint Ex. 7; Answer at 3). On March 31, the Union requested the Respondents to participate in the process to select an arbitrator from the FMCS panel. (Complaint at 3; Answer at 3). On April 5, 2011, the Respondents requested FMCS withdraw the panel of arbitrators. (Complaint at 3; Answer at 3). In its letter to FMCS, Respondents maintained that "the grievance was substantially neither grievable nor arbitrable, but must be challenged as provided for in Article 38, Sec. D of the collective bargaining agreement," and cited to *AT&T Techs v. Communications Workers of America*, 475 U.S. 643, 656 (1986) for its allegation that "the courts have determined that arbitrability is a matter to be determined by the court." (Complaint Ex. 9). On April 8, 2011, the Union requested FMCS directly designate an arbitrator. (Complaint at 3, Complaint Ex. 10; Answer at 3). On April 11, 2011, the Respondents again requested FMCS withdraw the panel of arbitrators, reiterating its argument that the parties' CBA requires issues of substantive arbitrability be determined by the courts in accordance with applicable law, and contending that the Abolishment Act renders the arbitration clause invalid. (Complaint at 3, Complaint Ex. 11; Answer at 4). On April 22, 2011, FMCS issued a letter refusing to withdraw the panel of arbitrators or directly designate an arbitrator. (Complaint at 4, Complaint Ex. 12; Answer at 4). FMCS stated:

> The arguments contained in your letters an attachments would require FMCS to decide whether the matter is arbitrable based on

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1. If the Agency declares a grievance procedurally not grievable/arbitrable, it must make such declaration in writing in response to the Step 3 grievance or, if the initial step is after Step 3, in the response at the initial step. All questions of procedural grievability/arbitrability not raised in response to the Step 3 grievance or, if the initial step is after Step 3, the response at the initial step, shall be deemed waived. Questions of procedural grievability/arbitrability are for the arbitrator to decide and shall be decided by the same arbitrator selected to hear the merits of the grievance. Questions of substantive arbitrability/grievability will be pursued in accordance with applicable law.

[4] Article 38 , Section F "Selection of Arbitrator" states:

1. Selection of an Arbitrator – within ten (10) work days of the written notice to arbitrate, the Union shall request the Federal Mediation and Conciliation Service ("FMCS") to refer a panel of seven (7) impartial arbitrators. A copy of the FMCS panel request shall be sent to the Director, Office of Labor Relations and Collective Bargaining. Within fifteen (15) days of receipt of the FMCS panel, the parties shall select one of the names on the list as mutually agreeable, or if there is no mutually agreeable arbitrator, each party alternately strikes a name from the FMCS panel until one remains. A coin shall be tossed to determine who shall strike first. If none of the submitted arbitrators are acceptable, one (1) new panel may be sought before the selection process begins.
2. FMCS shall be empowered to make a direct designation of an arbitrator to hear the case if either party refuses to participate in the selection of an arbitrator.

> either the collective bargaining agreement, the Balanced Budget Holiday Furlough Emergency Act of 2011 and/or the Public Safety Civilian Emergency Personnel Furlough Exemptions Emergency Amendment Act of 2011.

(Complaint Ex. 12). Further, FMCS stated that it may not "decide the merits of a claim by either party that a dispute is not subject to arbitration," and that "to appoint an arbitrator at this time would exceed our authority." *Id.* FMCS denied "both the request of the union to make a direct appointment of an arbitrator and the request of the employer to rescind the panel," and stated that if the issue "is resolved in an appropriate forum that FMCS has authority to appoint an arbitrator, we will reconsider this decision." *Id.*

B. Analysis

As a threshold matter, the Board must address the Respondents' allegation that the Board lacks jurisdiction to decide this matter. In their Answer, the Respondents raise the affirmative defense that "[t]he Complainant is attempting to enforce what it alleges are contractual rights. Interpreting the arbitrability of contract rights cases is not within the jurisdiction of the [Board]." (Answer at 4).

The Board "distinguishes between those obligations that are statutorily imposed under the CMPA and those that are contractually agreed upon between the parties." *American Federation of Government Employees, Local 2741 v. District of Columbia Dep't of Recreation and Parks*, 50 D.C. Reg. 5049, Slip Op. No. 697, PERB Case No. 00-U-22 (2002). In addition, it is well established that the Board's "authority only extends to resolving statutorily based obligations under the CMPA." *Id.* Although a violation that is solely contractual is not properly before the Board, a contractual violation will be deemed an unfair labor practice if the complainant can establish that it also violates the CMPA, or constitutes a repudiation of the parties' CBA. *University of the District of Columbia Faculty Ass'n v. University of the District of Columbia*, 60 D.C. Reg. 2536, Slip Op. No. 1350 at p. 2, PERB Case No. 07-U-52 (January 2, 2013).

In the instant case, the Union contends that the Respondents repudiated the CBA when they implemented furlough days on four legal holidays, when they refused to strike for an arbitrator, and when they contacted FMCS to request the withdrawal of the arbitration panel. (Complaint at 4). A party's refusal to implement a viable collective bargaining agreement is an unfair labor practice. *See Teamsters Local Union Nos. 639 and 730 v. D.C. Public Schools*, 43 D.C. Reg. 6633, Slip Op. No. 400, PERB Case No. 93-U-29 (1994). If an employer entirely fails to implement the terms of a negotiated or arbitrated agreement, such conduct constitutes a repudiation of the collective bargaining process and a violation of the duty to bargain. *Id.* at 7; *see also American Federation of State, County, and Municipal Employees, District Council 20 v. District of Columbia Government*, Slip Op. No. 1387 at p. 4; PERB Case No. 08-U-36 (May 9, 2013).

The parties do not dispute that the Respondents implemented the furlough days, refused to strike for an arbitrator, and requested FMCS withdraw the arbitration panel. (Complaint at 2-

4; Answer at 2-4). The Union's unfair labor practice allegations are predicated on the Respondents' refusal to arbitrate over the furloughs, and the essential legal question is whether the dispute over the furloughs was arbitrable. If the furloughs were not arbitrable, then the Respondents could not have repudiated the contract, and thus have not committed an unfair labor practice, by refusing to proceed to arbitration.

In general, Board precedent states that "arbitrability is an initial question for the arbitrator to decide." *American Federation of Government Employees, District Council 20 v. D.C. General Hospital, et al.*, 36 D.C. Reg. 7101, Slip Op. No. 227 at p. 5, PERB Case No. 88-U-29 (1989); *see also D.C. Dep't of Public Works v. American Federation of Government Employees, Local 872*, 38 D.C. Reg. 5072, Slip Op. No. 280 at p. 3, PERB Case No. 90-A-10 (1991); *American Federation of Government Employees, Local 2725 v. D.C. Dep't of Consumer and Regulatory Affairs, et al.*, 59 D.C. Reg. 5347, Slip Op. No. 930, PERB Case No. 06-U-43 (2008). However, Article 38, Section D(1) of the parties' CBA distinguishes between the treatment of questions of substantive arbitrability and procedural arbitrability. While the CBA states that questions of procedural arbitrability are to be determined by an arbitrator, "[q]uestions of substantive arbitrability/grievability will be pursued in accordance with applicable law." *Id*

Therefore, this case will proceed to an unfair labor practice hearing to determine whether the furloughs at issue in this case are arbitrable.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Board's Executive Director shall refer the American Federation of Government Employees, Local 631's Unfair Labor Practice Complaint to a hearing examiner.

2. The Notice of Hearing shall be issued seven (7) days prior to the date of the hearing.

3. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

September 30, 2013

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 11-U-36 was transmitted via U.S. Mail and e-mail to the following parties on this the 30th day of September, 2013.

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