

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**

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In the Matter of:	)	
	)	
American Federation of Government	)	
Employees, Local 2978	)	
	)	PERB Case No. 20-U-02
Complainant	)	
	)	Opinion No. 1757
v.	)	
	)	
The District of Columbia Government	)	
Department of Health	)	
	)	
Respondent	)	

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**DECISION AND ORDER**

**I. Statement of the Case**

On November 19, 2019, the American Federation of Government Employees Local 2978 (AFGE) filed this Unfair Labor Practice Complaint (Complaint). AFGE alleges that the District of Columbia Department of Health (DOH) violated D.C. Official Code § 1-617.04(a) when it refused to proceed to arbitration and as a result repudiated the parties' collective bargaining agreement (CBA). DOH filed a timely Answer to the Complaint.

After a thorough review of the record, the Board finds that DOH committed an unfair labor practice by refusing to proceed to arbitration.

**II. Background**

On April 11, 2019, AFGE filed a grievance alleging that DOH failed to provide environmental pay to employees consistent with the parties' CBA.<sup>1</sup> AFGE claims that DOH failed to respond to the grievance.<sup>2</sup> On May 16, 2019, AFGE invoked arbitration.<sup>3</sup> On May 20, 2019, the Federal Mediation and Conciliation Services (FMCS) sent a letter to DOH requesting

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<sup>1</sup> Complaint at 2 ¶ 1. Answer at 2 ¶ 1.

<sup>2</sup> Complaint at 2.

<sup>3</sup> Complaint at 3 ¶ 4. Answer at 2 ¶ 4

that the agency select an arbitrator from a panel provided in the letter.<sup>4</sup> On October 22, 2019, DOH responded to the letter by asserting that the matter was not arbitrable and requested that FMCS forgo the appointment of an arbitrator.<sup>5</sup> In its Answer, DOH argues that the grievance filed by AFGE is substantively not arbitrable, and therefore, should not proceed to arbitration.<sup>6</sup>

### III. Position of the Parties

AFGE claims that DOH has committed an unfair labor practice by refusing to comply with the sole enforcement mechanism provided in the CBA.<sup>7</sup> AFGE relies on Article 14, § A-B, which states, in pertinent part, that “grievances concerning compensation shall be filed with the appropriate agency and the Office of Labor Relations and Collective Bargaining under the applicable working conditions agreement.”<sup>8</sup> AFGE argues that DOH has failed to fulfill its obligation to comply with the D.C. Official Code by repudiating every provision of the Compensation Agreement as well as the sole enforcement mechanism for the CBA.<sup>9</sup>

DOH argues that the Board lacks jurisdiction in this case, because the Complaint concerns an obligation established in the CBA.<sup>10</sup> DOH relies on Article 38, § 13 of the CBA, which states that “matters not within the jurisdiction of the Department will not be processed as a grievance under this Article.”<sup>11</sup> DOH argues that the Board has previously held that when the parties have agreed to allow their negotiated agreement to establish the obligations that govern the acts alleged in the complaint, the Board lacks jurisdiction over the complaint’s allegations.<sup>12</sup> DOH denies committing an unfair labor practice; nevertheless, it asserts that the Board does not have jurisdiction and the Complaint should be dismissed.<sup>13</sup>

### IV. Discussion

As a threshold matter, the Board must address DOH’s allegation that the Board lacks jurisdiction to decide this matter. The Board distinguishes between obligations that are statutorily imposed under the Comprehensive Merit Personnel Act (CMPA) and those that are contractually agreed upon between the parties.<sup>14</sup> It is well established that the Board’s authority only extends to resolving statutorily based obligations under the CMPA.<sup>15</sup> A violation that is solely contractual is not properly before the Board but a contractual violation will be deemed an unfair

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<sup>4</sup> Exhibit 4.

<sup>5</sup> Exhibit 4.

<sup>6</sup> Answer at 2.

<sup>7</sup> Complaint at 4.

<sup>8</sup> Exhibit 5 at 20.

<sup>9</sup> Complaint at 4.

<sup>10</sup> Answer at 5.

<sup>11</sup> Answer at 5.

<sup>12</sup> Answer at 5.

<sup>13</sup> Answer at 5.

<sup>14</sup> *AFGE, Local 2741 v. D.C. Dep’t of Recreation and Parks*, 50 D.C. Reg. 5049, Slip op. No. 697, PERB Case No. 00-U-22 (2002).

<sup>15</sup> *Id.*

labor practice if the complainant can establish that it also violates the CMPA, or constitutes a repudiation of the parties' CBA.<sup>16</sup>

In the instant case, AFGE claims that DOH repudiated the CBA when it refused to proceed to arbitration over its grievance. A party's refusal to implement a viable CBA is an unfair labor practice.<sup>17</sup> If an employer 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.<sup>18</sup>

The parties do not dispute that DOH refuses to proceed to arbitration.<sup>19</sup> DOH claims that the grievance filed by AFGE is substantively not arbitrable and should not proceed to arbitration.<sup>20</sup> AFGE's unfair labor practice allegations are predicated on DOH's refusal to arbitrate over environmental pay. The essential question is whether the dispute over the environmental pay was arbitrable. If it was not arbitrable, then DOH could not have repudiated the contract, and thus, has not committed an unfair labor practice by refusing to proceed to arbitration.

In general, Board precedent states that "arbitrability is an essential question for the arbitrator to decide."<sup>21</sup> DOH claims that the CBA precludes the grievance from continuing to arbitration. The District of Columbia Court of Appeals has found that "any initial dispute over whether a demand for arbitration is encompassed by the parties' arbitration agreement should be answered by the Superior Court [of the District of Columbia] *if a party seeks to stay arbitration and the parties' agreement does not clearly direct that dispute to the arbitrator.*"<sup>22</sup> The court goes on to state that "...consistent with the Arbitration Act, the Superior Court's role is limited to preventing a party from being forced to arbitrate a controversy that is clearly not encompassed by the parties' arbitration agreement."<sup>23</sup>

The Board has found in prior cases that repudiation of the contract is an unfair labor practice.<sup>24</sup> The Board has previously held that disputes over the meaning or application of terms of a CBA are matters for resolution through the grievance procedure rather than an unfair labor

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<sup>16</sup> *UDC Faculty Ass'n v. UDC*, 60 D.C. Reg. 2536, Slip Op. No. 1350 at p. 2, PERB Case No. 07-U-52 (2013).

<sup>17</sup> *See Teamsters Local Union Nos. 639 and 730 v. DCPS*, 43 D.C. Reg. 6633, Slip Op. No. 400, PERB Case No. 93-U-29 (1994).

<sup>18</sup> *Id.* at 7; see also *AFSCME, District Council 20 v. District of Columbia Government*, Slip Op. No. 1387 at p. 4, PERB Case No. 08-U-36 (2013).

<sup>19</sup> Complaint at 3 ¶ 6. Answer at 2 ¶ 6.

<sup>20</sup> Answer at 2.

<sup>21</sup> *AFGE, 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 *DPW v. AFGE Local 872*, 38 D.C. Reg. 5072, Slip Op. No. 280 at p. 3, PERB Case No. 90-A-10 (1991); *AFGE Local 2725 v. DCRA, et al.*, 59 D.C. Reg. 5347, Slip Op. No. 930, PERB Case No. 06-U-43 (2008).

<sup>22</sup> *Washington Teachers' Union, Local No. 6, Am. Fed'n of Teachers, AFL-CIO v. D.C. Pub. Sch.*, 77 A.3d 441, 455 (D.C. 2013) (emphasis added).

<sup>23</sup> *Id.* at 456 (citing D.C. Official Code sections 16-4406(b),-4407).

<sup>24</sup> *Teamsters Local Unions No. 639 & 730 v. D.C. Pub. Sch.*, 43 D.C. Reg. 6633, Slip Op. No. 400 at p.7, PERB Case No. 93-U-29 (1994). *See also D.C. Water & Sewer Auth. v. AFGE, Local 872*, 59 D.C. Reg. 4659, Slip Op. No. 949 at pp. 6-7, PERB Case No. 05-U-10 (2009).

practice complaint.<sup>25</sup> However, if an employer has entirely failed to implement the terms of the negotiated or arbitrated agreement, such conduct constitutes a repudiation of the collective bargaining process and a violation of the duty to bargain. Furthermore, the Board has found that a refusal to proceed to arbitration is interfering with, restraining and coercing employees in the exercise of their rights under D.C. Official Code § 1-617.04(a)(1).<sup>26</sup> In this case, DOH has not sought a stay of arbitration from the Superior Court. DOH has simply refused to participate in the arbitration process. An arbitrator or Superior Court may state that the entitlement of employees to environmental pay is not arbitrable; however DOH has unlawfully stalled the process by refusing arbitration and failing to seek a stay of arbitration. The Board finds that DOH's refusal to proceed to arbitration without a stay of arbitration from Superior Court is a repudiation of the contract.

## V. Conclusion

Based on the foregoing, the Board finds that DOH violated section 1-617.04(a) of the D.C. Official Code by refusing to proceed to arbitration.

## ORDER

### IT IS HEREBY ORDERED THAT:

1. The American Federation of Government Employees Local 2978's unfair labor practice complaint is granted.
2. The District of Columbia Department of Health shall cease and desist from violating section 1-617.04(a)(1) of the D.C. Official Code and must proceed to arbitration.
3. The District of Columbia Department of Health shall cease and desist from interfering with, restraining, or coercing, in any like or related manner, employees represented by AFGC Local 2978 in the exercise of rights guaranteed by the Comprehensive Merit Personnel Act.
4. Within fourteen (14) days from service of this Decision and Order, the District of Columbia Department of Health shall post the attached Notice conspicuously where notices to employees in this bargaining unit are customarily posted and electronically distribute the Notice through email or similar means in which notices are customarily distributed during the current Public Health Emergency. Once posted the Notice must

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<sup>25</sup> *Teamsters at 7. See also FOP/MPD Labor Comm. v. MPD*, 39 D.C. Reg. 9617, Slip Op. No. 295 at n.2, PERB Case No. 91-U-18 (1992).

<sup>26</sup> *FOP/DHS Labor Comm. v. DHS*, 59 D.C. Reg. 3296, Slip Op. No. 812, PERB Case No. 02-U-24 (2002). *See also AFGC, Local 631 v. DPW*, 59 D.C. Reg. 5981, Slip Op. No. 1001, PERB Case No. 05-U-43 (2012).

remain posted until thirty (30) days after the District of Columbia lifts the current Public Health Emergency; and

5. The District of Columbia Department of Health shall notify the Public Employee Relations Board, in writing, within fourteen (14) days from the issuance of this Decision and Order that Notices have been posted and distributed as ordered.
6. Pursuant to Board Rule 559, this Decision and Order is final upon issuance.

**BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD**

By unanimous vote of the Board Chairperson Douglas Warshof, Members Ann Hoffman, Barbara Somson, Mary Anne Gibbons, and Peter Winkler.

August 20, 2020

Washington, D.C.

# NOTICE

**TO ALL EMPLOYEES REPRESENTED BY THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 2978 (AFGE) AT THE DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH, THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE DISTRICT OF COLUMBIA PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 1757 PERB CASE NO. 20-U-02.**

**WE HEREBY NOTIFY** our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered us to post this notice.

**WE WILL** cease and desist from violating section 1-617.04(a)(1) of the D.C. Official Code by failing to proceed to arbitration.

**WE WILL NOT**, in any like or related manner, interfere with, restrain or coerce our employees represented by AFGE in the exercise of their rights under the Comprehensive Merit Personnel Act.

**WE WILL** negotiate in good faith with AFGE, upon request.

**District of Columbia Department of Health**

Date: \_\_\_\_\_

By: \_\_\_\_\_

**This Notice must remain posted for thirty (30) consecutive days after the District of Columbia lifts the current Public Health Emergency and must not be altered.**

If employees have any questions concerning the Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, by email at [perb@dc.gov](mailto:perb@dc.gov), by mail at 1100 4<sup>th</sup> Street SW, Suite 630E, Washington, D.C. 20024. Phone: 202-727-1822.

**CERTIFICATE OF SERVICE**

This is to certify that the attached Decision and Order in PERB Case No. 20-U-02, Opinion No. 1757 was served to the following parties via File & ServeXpress on this the 1<sup>st</sup> day of September 2020:

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/s/ Merlin M. George  
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Attorney Advisor